No. 95-152

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1995

MAGDA MONTIEL DAVIS,

Petitioner,

vs.

MARIETA FANDINO, HILDA INCLAN and MARIETA FANDINO d/b/a *LA VERDAD*,

Respondents.

On Petition for a Writ of Certiorari to the Third District Court of Appeal of the State of Florida

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD J. OVELMEN
Counsel of Record
BAKER & McKENZIE
Attorneys for Respondents
701 Brickell Avenue
Suite 1600
Miami, Florida 33131
(305) 789-8929

7572
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Whether the courts below correctly interpreted *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), in dismissing this libel suit, directed at a columnist's opinion that a candidate for Congress is pro-Castro ("Castrista") and "represents the interests of Castro in exile," on the ground that the term and the phrase, taken in proper context, do not assert, or imply, verifiably false and defamatory statements of fact, but rather constitute inherently controversial political opinions, caustic judgments, and vituperative epithets, which are protected by the First Amendment, particularly where published by a small "broadsheet-type" Spanish-language community newspaper in a signed column of political opinion during the heat of a political campaign?

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RESPONDENTS' BRIEF IN OPPOSITION

Marieta Fandino, Hilda Inclan, and Marieta Fandino d/b/a *La Verdad* respectfully request this Court deny the Petition for a Writ of Certiorari to review the judgment of the Third District Court of Appeal of the State of Florida.

OPINIONS BELOW

The judgment of the District Court of Appeal, Third District of Florida, which affirmed *per curiam* the judgment of the trial court, is reported at 643 So. 2d 516 (Fla. 3rd Dist. Ct. App. 1995), is included in the Appendix to the Petition, and states, in its

entirety, as follows: "Affirmed. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1(1990)." The judgment and opinion of the trial court is unreported and included in the Appendix to the Petition, at 2-6.

STATEMENT OF JURISDICTION

The Petition suggests jurisdiction over this appeal is governed by *St. Paul Title Insurance Corp. v. Davis*, 392 So. 2d 1304 (Fla. 1980), and *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980), because the decision of the District Court of Appeal was issued "without opinion." (Pet. Writ Cert. ("Pet.") at 2.) This is not correct. This appeal is governed by *Florida Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988), a subsequent decision of the Florida Supreme Court which addresses and controls the issue of its jurisdiction over decisions of the Florida District Courts of Appeal that are issued only with the citation of authority, as opposed to decisions with no opinion and no citation of authority.

In the text of *Florida Star*, the Florida Supreme Court asserts that it has subject matter jurisdiction over a decision which contains "a citation effectively establishing a point of law upon which the decision rests." *Id.* at 288. The court proceeds to hold that:

> While this Court has subject-matter jurisdiction to hear any petition arising from an opinion that establishes a point of law, we have operated within the intent of the constitution's framers, as we perceive it, in refusing to exercise our discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court.

Id. at 288-89. In a footnote, the Florida Supreme Court directly

addresses the distinction between decisions of the District Courts of Appeal that are issued without opinion, and those issued with only a citation of authority:

> This Court does not, however, have subject matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation. Thus, a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the cause, and appeal may be taken directly to the United States Supreme Court. Moreover, there can be no actual conflict discernible in an opinion containing only a citation to other case law unless one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court or of this Court.

Id. at 288 n.3. Since the decision of the District Court of Appeal below contains only a citation to authority which was not pending in the Florida Supreme Court, which has not been reversed or receded from, and does not reference a contrary citation, the Florida Supreme Court would have lacked "constitutional discretion" to assume jurisdiction over the case on the basis of "conflict jurisdiction."

Respondents believe, although it may not be entirely clear, that direct petition for review from the District Court of Appeal to this Court is available here because, as a matter of Florida law, the

decision of the District Court of Appeal cannot be said to establish any proposition of law which could be in conflict with any other. If that is not the case, there would have been jurisdiction in the Florida Supreme Court, and the Petition would have to be dismissed for failure to exhaust state court remedies.

STATEMENT OF THE CASE

Because the Statement of the Case presented in the Petition materially misstates the claims made and adjudicated in the trial court, and misrepresents the issues properly before the District Court of Appeal, and because Petitioner consequently has posed "Questions Presented" to this Court which are not before it, Respondents submit this Statement which correctly reviews the record and properly states the issues decided below. In particular, it is shown that Petitioner did not argue in the Florida trial court that the statements sued upon are actionable because they are based on false statements of fact. Instead, she alleged that the statements sued upon were libelous per se, that is, libelous in and of themselves. The trial court properly ruled that, under *Milkovich*, the statements neither asserted nor implied verifiably false and defamatory statements of fact.

Petitioner could make no other argument to the trial judge because at no time in the trial court did she allege the falsity of the "factual statements" upon which, on appeal and now in the Petition, she asserts the opinion statements are based. This allegation was made for the first time on appeal. Since Florida appellate law precludes the raising of new issues on appeal which have not been presented to the trial court, and the Florida substantive law of libel requires that a retraction demand set forth specifically each false and defamatory statement or implication upon which a claim is made as a condition precedent to the lawsuit, this claim was not before the District Court of Appeal and not decided by it. Moreover, as noted above in the section on

Jurisdiction, the decision of the District Court of Appeal cannot be read as establishing any point of law which could be in discernable conflict with any other legal proposition, or there would have been jurisdiction in the Florida Supreme Court, not this Court.

This dispute arose out of the public debate over the political campaign of Petitioner, Magda Montiel Davis, against Ileana Ros-Lehtinen for a seat in the United States House of Representatives.

A. The Articles

La Verdad is a small "mom and pop" newspaper published weekly in Spanish for the Hispanic community in Dade County, Florida. (App. 8.)[1] On September 17, 1992, *La Verdad* published a by-lined column of political opinion by Hilda Inclan entitled "Proof Of The Link To Castro of the Woman Who Is Opposing Ileana Ros." (R. App. 6a-13a.)[2] The first five paragraphs of the column express the writer's high opinion of Ileana Ros-Lehtinen, and lauds her achievements as one of the leading political opponents of Fidel Castro in our national government. (R. App. 10a-11a.) The next three paragraphs introduce Plaintiff/ Petitioner, Magda Montiel Davis, as a challenger to Ileana Ros-Lehtinen, and react to Davis's widely reported and highly provocative hyperbolic statements that she "disagrees with everything Ileana represents" and that she was certain that for this reason in Miami she would be "branded a communist." (R. App. 11a) Ms. Inclan wrote:

---

1. Citations to the Appendix to the Petition are referenced by "App.;" citations to the Appendix to this Brief in Opposition are designated by "R. App.".

2. The Articles are all published in Spanish. Certified translations into English that were used in the courts below are reproduced in the Appendices.

> Nevertheless, in November's general elections, a challenger to Ileana has emerged from the Democratic Party.
>
> In her first statements to the press this week, at the Plaza de la Cubania, Magda Montiel Davis, the Democratic candidate for Ros-Lehtinen's seat, said that she "disagrees with everything that Ileana represents . . ." and that she was sure that in Miami, she would be "branded a Communist."
>
> Well, if she herself says so, it must be for a reason. And if, to start with, she is against EVERYTHING that Ileana supports, then logically she is against the liberation of Cuba and in favor of the Castro-communism which governs the island nowadays and which Ileana combats, together with her Cuban constituency.

(*Id.*) Thus, the column makes the logical point that if Davis is to be taken at her word, that she "disagrees with everything Ileana Ros represents," then she must be in favor of "Castro-communism."

Ms. Inclan further observed that one of Magda Davis's principal positions, that "humanitarian" aid shipments be sent to Cuba, would be in the interest of her attorney husband's client, a known agent of Castro in South Florida who arranges shipping to Cuba, and "ultimately Fidel Castro" himself:

> Now then, with what little we know about this Montiel Davis, we have more than enough grounds to repudiate her completely.

> On the Cuban question, Montiel Davis is only interested in increasing "humanitarian" shipments to Cuba in order to benefit Castro. And it is logical for this to be so, because the principal agency of shipments to Cuba, Marazul Charters, owned by Pancho Aruca, is a client of her husband, Jewish-American lawyer Ira J. Kurzban, whose last name she does not use.

(*Id.*) The column next proceeded to comment on a lawsuit in which Magda Davis's husband represented Marazul Charters and Pancho Aruca. Ms. Inclan noted that Marazul Charters is the "principal agency of shipment to Cuba" and that Aruca is "Castro's agent." The columnist observed:

> And what a coincidence that for Kurzban's wife, the virtually unknown Magda Montiel Davis, on the subject of Cuba, what is most important is increasing shipments from Miami to the island, through Marazul Charters, of course, thus benefitting her husband's "client," and, ultimately, Fidel Castro.
>
> Our exile community, which has endured so much for nearly 34 years, cannot accept the representation of traitors such as Montiel Davis and her husband, who serve the tyrant Fidel Castro, through his agent in Miami, Francisco (Pancho) Gonzalez Aruca.

(*Id.* at 12a-13a) Although this column was attached and filed with the original Complaint, (R. App. 1a-13a), it was not sued upon, nor was a retraction demand served regarding it. (*Id.*) It is not

attached to the Amended Complaint. (App. 21-38.) No reference is made to it in the text of either version of the Complaint. (R. App. 1a-5a; App. 7-17.)

On September 24, 1992, *La Verdad* published another column by Hilda Inclan regarding Magda Montiel Davis. This second column, entitled "Castroite ["Castrista" in Spanish] Democrat challenging our Congresswoman Ileana Ros," (App. 30-38), begins by referring back to the comments made in the September 17 column. Inclan characterizes the earlier column as having shown that "the Democratic opponent of our Federal Congresswoman Ileana Ros-Lehtinen responds to interests of Fidel Castro's regime in Cuba." Inclan's second column also claims Davis is a member of her husband's law firm and has her offices in the same premises. (*Id.*) The section of the column commenting on Magda Davis ends with the following rhetorical question:

> The question which arises is: What Cuban exile in his right mind would vote in favor of an unknown — a partner and wife of a lawyer trusted by Fidel Castro — and against Ileana Ros-Lehtinen, who has always defended exiled Cubans in their struggle for their rights and against the Castro-communist tyranny of Cuba?

(*Id.* at 33.) The bulk of the column presents an intensely personal critique of Jorge Mas Canosa, and a spirited defense of Ros-Lehtinen. Contrary to the Petition, nothing could be clearer than the rhetoric employed is that of a column of political opinion.

On October 1, 1992, *La Verdad* published another Inclan opinion column entitled "Our Legislator Ileana Ros-Lehtinen Takes On The Defender of Castro, More Evidence Of Montiel

Davis's Links To The Tyrant Castro." (App. 21-29.) This column begins by again referring back to the original September 17 article. The column then comments on yet another lawsuit in which Kurzban, Davis's husband, represented Castro's interests in America:

> Now then, we continue receiving reports of Kurzban's links to the government of the tyrant who oppresses our country. And so as we receive these documents and we verify them, we publish them for the information of the voters.
>
> In 1979 and 1980, Kurzban, the husband of Ileana's opponent, defended Castro's government before the federal courts, requesting the return to the tyrant of more than 8 million dollars.
>
> The case, dated December 10, 1979, bears number 79-112-CIV-CA. Documents of the Federal District Court reveal that Ira Kurzban represented the National Bank of Cuba and the Empresa Cubana Exportadora de Alimentos y Productos Varios (Cubaexport) in this case, together with lawyer Michael Krinsky, of New York.
>
> According to Kurzban's argument in court, these entities of Castro's government in Cuba were defrauded of $8,775,000 in a letter of credit used to finance a purchase of coffee which was not delivered.
>
> Kurzban, paid for his services with Cuban

> government money, did everything possible to obtain for Castro the return of this money.
>
> Can you imagine Kurzban's happiness if his wife made it to the United States Congress in Ileana's seat? Their opportunities to serve their client Fidel Castro would multiply even more. . . .

(*Id.* at 23-24.)

The column then praises Ros-Lehtinen for her defense of the Torricelli bill and urges that readers vote for her re-election. The remainder of the column addresses the need for Cuban Americans to register to vote and concludes with Inclan's personal recommendation that each Cuban American vote against the "Strong Mayor" amendment. (*Id.* at 27-28.)

In this portion of the column there is but one reference to Magda Davis:

> It is understood, therefore, that those who represent the interests of Castro in exile, such as Montiel Davis and her husband Kurzban, are anxious to replace [Ros-Lehtinen].
>
> Of course, it is also understood that the Cuban people in exile WILL GO OUT EN MASSE to vote for the greatest defender of our rights and our interests in Washington, our Congresswoman, Ileana Ros-Lehtinen.

(*Id.* at 26.)

It is clear that these three publications are vituperative, caustic expressions of political opinion which criticize a

candidate for Congress for positions she has taken regarding Ros-Lehtinen and shipments of aid to Cuba, and for her close relationship (husband/wife) to an attorney who has represented Cuban interests in American courts.

B. The Retraction Demands

On September 30, 1992, original counsel for Magda Davis[3] served a retraction demand on *La Verdad* claiming three "statements" published in the September 24, 1992, column were false and defamatory:

> Please be advised that I represent Magda Montiel Davis. On September 24, 1992 your newspaper ran a headline on both the front page and page 7, describing Ms. Davis as a supporter of Fidel Castro ("Castrista"). You also published a statement that Ms. Davis shares office space and is an associate of Mr. Ira Kurzban. When you published these statements, you knew them to be completely false and libelous.

(App. 18-19.) Thus, the retraction demand complained only of the label "Castrista," and of her affiliation with her own husband.[4] No claims were made beyond the assertions quoted

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3. Davis's original counsel, Lazara Balseiro, Esq., resigned her representation of Magda Davis immediately after news reports and videotape broadcast throughout South Florida showed Davis being kissed by Fidel Castro in Havana, and Davis calling Castro the "great teacher" of the Cuban people. That being called a "Castrista" does not imply any verifiable factual statement is perhaps best demonstrated by Petitioner's apparent belief these acts would not justify application of the term to her.

4. These contentions are unusual in several aspects. First, it is unusual for a wife to claim that being called an "associate" of her husband, or having (Cont'd)

above.[5] The letter did not dispute the infamous Davis quotation that she "disagreed with everything Ileana represented;" it did not complain about the logical conclusion drawn from her statement; it did not identify any falsity with regard to Davis's position on shipments to Cuba; it did not state there was any false statement made regarding Aruca's status as an agent of Castro; it did not assert the claim regarding Marazul Charters' role in shipments to Cuba was false; nor was there any other complaint about the characterizations of the lawsuits in which Mr. Kurzban had previously been involved. It did not state that these statements gave rise to any actionable implication, or that they somehow made the three "statements" complained-of, "actionable."

On October 2, 1992, Davis's lawyer served a second retraction demand on *La Verdad*. This letter complained of a single false "statement":

> In the article of October 1, at page 7, and on the cover of your "newspaper," you again state that Ms. Davis represents the interests of Fidel Castro in the United States.

(Cont'd)
their law practices share premises, would injure her reputation. Of course, this is especially true since, as a matter of law, such statements are not defamatory. The assertions are also unusual since Davis and Kurzban have for years listed themselves as having the exact same address for their law offices in Martindale-Hubbell and the Florida Bar Journal. (Appendix D to Answer Brief of Appellees in Florida District Court of Appeal.)

5. Under Florida law, a libel suit is strictly limited to defamatory statements specified in the retraction demand. Fla. Stat. § 770.01 *et seq.* (1993). The retraction demand is a condition precedent to any libel suit, and statements not specifically identified in the retraction demand cannot be part of the claim. Section 770.01 Florida Statutes; *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950); *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1473-75 (S.D. Fla. 1987) (holding notice insufficient for failure to specify statements sued upon in retraction demand; collecting authorities).

(App. 20.)

Again, no other purportedly false and defamatory "statements" are identified. The retraction letters failed to explain any basis for concluding that anything in the articles was false or to provide any support for such a claim. (*Id.* at 19-20.)

C. The Complaints

The original Complaint, fewer than five pages in length, was filed October 19, 1992. It purported to assert a single count for libel per se by claiming *La Verdad* had published four false and defamatory "statements" regarding Davis:

> (1) that by calling her a "Castrista," the Sept. 24th column meant that she "was a supporter of Fidel Castro";
>
> (2) that the Sept. 24th column was incorrect in stating "she shares office space";
>
> (3) "and is an associate of Ira Kurzban"; and
>
> (4) that the Oct. 1st column libeled her by stating that she "represents the interests of Fidel Castro in the United States."

(R. App. 3a-4a.)

On November 9, 1992, the Defendants/Respondents moved to dismiss the Complaint on multiple grounds, including (1) that the defamatory "phrases" sued upon were protected opinion and not statements constituting or implying verifiable facts; (2) that any statements of facts which were sued upon were not defamatory; and (3) that ultimate facts necessary to state a cause of action were not pled.

By agreement, the Plaintiff filed an Amended Complaint on March 14, 1994. (App. 7-17.) The new complaint dropped the allegations regarding Davis's membership in Kurzban's law firm and sharing office space. (*Compare* Compl. ¶ 13, R. App. 3a, *with* Am. Compl. ¶¶ 18 and 20, App. 13.) The sole allegations of defamation in the Amended Complaint were that Defendants defamed Davis by calling her a "Castrista" and "a representative of Castro's interests in the United States" (App. 13-14, Am. Compl. ¶ 21.)[6]

The Amended Complaint again did not challenge or claim false any of the column's comments on Davis's position regarding Ros-Lehtinen, Davis's position on shipments to Cuba, Aruca's relationship to Castro, Marazul's relationship to Castro, or the characterization of the lawsuits in which Kurzban represented Cuban interests. (App. 7-17.) Thus, Davis's assertions on appeal and in her Petition, that certain of these statements are false, were not raised in either the retraction demands or the complaints.

D. The Dismissal Of The Amended Complaint

La Verdad moved once again to dismiss the Amended Complaint, and supported the motion with a memorandum of law which argued, among other things, that the political expression sued upon is not actionable under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990), and other Supreme Court precedent protecting "caustic, vituperative political speech rife with vigorous epithet," because it does not state, or imply, a verifiably false factual statement or factual connotation. (R. App.

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6. Elsewhere, the Amended Complaint characterized *La Verdad's* published statement as "Montiel Davis represents the interests of Fidel Castro in the United States." (App. 12, Am. Compl. ¶ 17.) The translation of the October 1 article submitted by Davis translates the language sued upon as "those who represent the interests of Castro in exile, such as Montiel Davis and her husband Kurzban." (App. 26.)

35a-50a.) The memorandum of law quoted language from *Milkovich* which it asserted precluded any finding that the political speech published here could be considered actionable:

> Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved. Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provable false factual connotation will receive full constitutional protection.
>
> Next, the *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. *Falwell*, 485 U.S., at 50, 99 L. Ed. 2d 41, 108 S. Ct. 876. This provides assurances that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. See *id.*, at 53-55, 99 L. Ed. 2d 41, 108 S. Ct. 876.

(R. App. 39a-40a, quoting *Milkovich* at 19-20 (footnote omitted)). The memorandum argued that if it is not actionable to

state that "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," then it cannot be actionable to call Davis a "Castrista." More broadly the memorandum argued that words like "Castrista" are both too vague to imply any particular factual claims, but also cannot do so because they involve inherently controversial political judgments and opinions. There is no agreement as to what should count as justifying application of the term "Castrista."

The Plaintiff filed a twenty-page memorandum of law in which she argued in relevant part that the Amended Complaint stated a cause of action for libel because the two "statements" sued upon are themselves false and defamatory *per se*. (R. App. 15a-34a.) No claim was made in the memorandum that the statements sued upon are actionable because they are based on false statements of fact. Indeed, the memorandum made no claim that any statements other than the two sued upon are false. (*Id.*) Indeed, at oral argument before the trial court, Mr. Kurzban made it crystal clear that his argument was based solely on the defamatory nature and asserted verifiability of the two statements themselves:

> Both statements state — the first one states that Magda Davis is a supporter of Fidel Castro. The second statement was Montiel Davis represents the interests of Fidel Castro in the United States. Those are statements of fact. They can be verified as to whether or not — the implication obviously is that she's an agent for Fidel Castro in the United States and represents his interests.

(R. App. 66a.)

No argument was ever made before the trial court that there were false factual statements upon which the two actionable

statements were based, and that the falsity of those statements rendered the "opinion" statements actionable.

After hearing oral argument and reviewing the memoranda, the trial court dismissed the case with prejudice because it found that the statements sued upon are protected by the First Amendment as non-actionable expression constituting "political opinion and judgments." (App. 2.) The trial court quoted the relevant language from *Milkovich* concerning Marxism and expressly concluded that the language at issue here, like the language in *Milkovich*, was not actionable because it neither constituted nor implied a false statement of fact:

> *Thus, in Milkovich, the statement that a public official has embraced Marxism was held to inherently involve political judgments and opinion, and not to constitute, or imply, a statement of fact which is verifiably false. Accordingly, it was not actionable.* In the case at bar, the statement that the Plaintiff is "pro-Castro," or serves his interests, similarly constitutes an expression of political opinion and judgment which is not actionable.

(App. 4 (emphasis added).)

E. The Appellate Proceedings

In her Initial Brief to the District Court of Appeal, Davis principally argued that the trial court had misapplied *Milkovich*, but the brief also argued for the first time in the case that the two statements sued upon were actionable, even if themselves statements of opinion, because they were based upon other published statements that are verifiable and false. (Initial Br. 23-4). In particular, Davis alleged, as she has in the Petition, that the

statement that Aruca is an agent of Castro is false, that Marazul Charters is not a Castro corporation, and that her husband Kurzban is not Castro's lawyer in America. (*Id.*; Pet. 4-6, 10-13). But none of these claims had been made to the trial court.

Respondents, in their Answer Brief in the District Court of Appeal argued that *Milkovich* had been properly applied and that Florida law does not authorize an appellant to inject new claims and new issues into a case at the appellate level. (Answer Br. 10, 25).

In her Reply Brief, Davis's central argument was that the two statements sued upon were actionable because they were based upon the newly asserted false statements, that Aruca and Marazul Charters are not agents of Castro, and thus Kurzban is not Castro's lawyer in America. (Reply Br. 2-18).

The District Court of Appeal affirmed the trial court's order without opinion other than its citation to *Milkovich*.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because the Florida trial court correctly applied *Milkovich*, and the District Court of Appeal properly affirmed that application. The claims and issues that the Petition asserts in its Questions Presented were not argued in the Florida trial court, were not properly before the District Court of Appeal, and therefore were not preserved for review by this Court. For these reasons the writ should be denied.

A. The Florida Courts Correctly Applied *Milkovich*.

While this Court has noted that First Amendment rights are not absolute, it also has held that "it can hardly be doubted that the

constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, (1989), this Court reaffirmed that the First Amendment applies with special force to speech about candidates for political office:

> There is little doubt that "public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule," *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971), and the strongest possible case for independent review. As Madison observed in 1800, just nine years after ratification of the First Amendment:
>
> > "Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." 4 J. Elliot, Debates on the Federal Constitution 575 (1861).
>
> This value must be protected with special vigilance. When a candidate enters the

> political arena, he or she "must expect that the debate will sometimes be rough and personal," *Ollman v. Evans*, 242 U.S. App. D.C. 301, 333, 750 F.2d 970, 1002 (1984) (*en banc*) (Bork, J., concurring), *cert denied*, 471 U.S. 1127 (1985), and cannot "'cry Foul!' when an opponent or an industrious reporter attempts to demonstrate" that he or she lacks the "sterling integrity" trumpeted in campaign literature and speeches, *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274, (1971). Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty.

491 U.S. at 686-87; *accord, Monitor Patriot Co.*, 401 U.S. at 274-76.

There is, this Court has observed, "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Such political expression often employs "rhetorical hyperbole" and "vigorous epithet." *Milkovich*, 497 U.S. at 17. This libel suit would seek to muffle our national conversation concerning candidates for Congress and censor our long-accepted tradition of "robust" and "wide-open" political speech.

In *Milkovich*, this Court held that political speech enjoys a formidable array of constitutional protections. The opinion reasoned that a separate and independent privilege for statements of opinion was not necessary because of these existing

protections. In particular, this Court found that the requirement that a statement must be "provable as false" to be actionable, a requirement imposed on all libel plaintiffs suing on matters of public concern, provides the press with adequate protection. Thus, this Court held, a statement of opinion is not actionable unless it implies a false statement of fact which is defamatory:

> Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant in involved. Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps ensures that a statement of opinion relating to matters of public concern which does not contain a provable false factual connotation will receive full constitutional protection.*
>
> Next, the *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. *Falwell,* 485 U.S., at 50. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation.

Id. at 19-20 (emphasis added; footnote omitted). A statement of opinion is simply not actionable if it does not contain or imply a false statement of fact, or if it cannot reasonably be interpreted as stating an "actual fact" about the plaintiff.

What *Milkovich* reaffirms is that political "name-calling," however defamatory, is not actionable, nor are expressions which inherently invoke political values and judgments, as opposed to those stating or implying facts. Moreover, the decision explicitly observes that a statement of opinion very nearly like the expression sued upon here is *not actionable:*

> Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable.

Id. at 20. The former statement is actionable because it logically entails or implies the fact that Mayor Jones has lied about matters. Such a factual claim may be verified. The latter statement implies only political judgments about Mayor Jones which cannot be empirically verified.

The point of law was perhaps best stated in Victor Lasky's celebrated lawsuit against ABC, *Lasky v. American Broadcasting Cos.*, 606 F. Supp. 934, 940 (S.D.N.Y. 1985):

> The recollections of Mr. Lasky, Ms. Mundel, Legionnaire Michael and others concerning the American Legion meeting presented a vivid picture of a community gathering, enlivened by a forceful speaker, discussing a matter of paramount public concern. Legionnaire Michael recalled that

both Mr. Lasky and Ms. Mundel engaged in a shouting match in which Lasky called Mundel a communist and she called him a Nazi. It is precisely this type of exchange which has been characterized in the law of libel as the expression of opinion, or more specifically, epithets which express a speaker's emotions rather than assertions of fact. Such name calling, in the context of public debate, is protected speech because of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open and . . . it may well include vehement, caustic and sometimes unpleasant sharp attacks." *New York Times v. Sullivan*, 376 U.S. at 270, 84 S.Ct. at 720. Such speech has been characterized in other opinions by the Supreme Court as "no more than rhetorical hyperbole, a vigorous epithet . . . *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6, 14, 90 S.Ct. 1537, 1541, 26 L.Ed.2d 6 (1970), or "a lusty and imaginative expression . . . of contempt," *Letter Carriers v. Austin*, 418 U.S. 264, 286, 94 S.Ct. 2770, 2782, 41 L.Ed.2d 745 (1974).

In *National Association of Government Employees v. Central Broadcasting*, 396 N.E.2d 996 (Mass. 1979) *cert. denied*, 446 U.S. 935, 100 S.Ct. 2152, 64 L.Ed.2d 788 (1980) the court explained that accusing another of being a communist is not libel when it occurs in the midst of public debate in which voices are expected to be raised in sloganeering invective.

Similarly, in the oft-cited case of *Ollman v. Evans*, 713 F.2d 838 (D.C. Cir. 1983), *reh'g granted en banc*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985), the court concluded that the expression "political Marxist" is not actionable.

> Having reviewed the context of the challenged statements, we turn next to the alleged defamation that, in our view, is most clearly opinion, namely that "[Ollman] is an outspoken proponent of political Marxism." This kind of characterization is much akin to the characterization, "fascist," found absolutely protected in *Buckley v. Littell*, *supra*. This is unmistakably a "loosely definable, variously interpretable statement[ ] of opinion . . . made inextricably in the contest of political, social or philosophical debate . . . ." 539 F.2d at 895. It is obviously unverifiable. Since Mr. Ollman concedes that he is a Marxist, *see* Letter of B. Ollman to the Editors of *The Washington Post* (May 8, 1978), R. 3, the trier of fact in assessing the statement would have the dubious task of trying to distinguish "political Marxism" from "nonpolitical Marxism," whatever that may be.

750 F.2d at 987. *Accord, Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994) (expression "sloppy journalism" not actionable when published in context of book review); *Koch v. Goldway*, 817 F.2d 507 (9th Cir. 1987) (expression associating plaintiff with Nazi War criminal is non-actionable political "slur" in the nature of opinion when published in the context of public debate over rent-control); *McCabe v. Rattiner*, 814 F.2d 839 (1st

Cir. 1987) (use of "scam" to characterize encounter with condominium sales people is non-actionable opinion); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) (calling William F. Buckley, Jr., a "fascist," "fellow traveler," and member of "radical right" is protected opinion, not false statement of fact); *Haberstroh v. Crain Publications, Inc.*, 545 N.E.2d 295 (Ill. App. Ct. 1989) (labeling professor a "commie" is non-actionable rhetorical hyperbole).

Thus, the Florida courts correctly applied *Milkovich* to hold that calling Davis a "Castrista" and a "representative of Castro's interests in the United States" is "loose figurative political opinion" which does not imply or entail any verifiable factual statement about Davis:

> As *Milkovich* explains, this result follows from a long line of Supreme Court decisions highly protective of defamatory political speech which is understood to communicate statements of opinion or political judgments, as opposed to false statements of verifiable fact. In *Greenbelt Cooperative Publishing Assoc.*, the Court held that accusing a public official of "blackmail" was not actionable, but rather was no more than vigorous epithet used to characterize his negotiating tactics. In *Letter Carriers v. Austin*, use of the term "traitors" to refer to nonunion workers was held not actionable. In *Hustler*, a political cartoon suggesting the plaintiff's first sexual experience was the act of incest with his mother in an outhouse was not actionable.
>
> The statements sued upon here clearly fall within the ambit of protection afforded

> political speech by the First Amendment. The articles do no more than offer the author's political judgment and opinion that the plaintiff's view are much too sympathetic to the Castro regime.

(App. 4.)

This is made especially clear by the facts of *Milkovich* itself and the implication it recognizes. The defamatory column in *Milkovich* stated repeatedly that the plaintiff had lied under oath at a judicial hearing held in a suit to enjoin sanctions against a high school wrestling program and its coach which were imposed by the Ohio High School Athletic Association ("OHSAA"). (497 U.S. at 4-5 quoting *Milkovich v. News-Herald*, 46 Ohio App. 3d 20, 21, 545 N.E. 2d 1320, 1321-1322 (1989).)

This Court held that because the column stated that the coach lied under oath in a judicial proceeding it implied that he committed the crime of perjury. This Court found this logically entailed assertion to be an implied statement of fact which could be readily verified since there was a transcript of the hearing, and one of his prior testimony in the OHSAA proceeding, and they were asserted to reflect totally different stories. The two transcripts needed only to be compared. *(Id.* at 21-22.)

Thus, what is meant by a factual implication or connotation is a fact which is logically entailed or "contained" in the assertedly actionable statement of opinion. If one opines that a person has lied under oath at a judicial proceeding, the remark entails the factual claim that the crime of perjury has been committed. Conversely, calling someone a "Castrista" or a "representative of Castro's interests in the United States" entails or implies no particular factual claim. This is not to say that many factual considerations would not be relevant in evaluating

whether the opinion is "well justified," but such considerations are not "implied," or entailed, or factual connotations contained in the expressions. This is not only because these expressions are too indefinite and figurative, but also because deciding what would count as evidence of being a "Castrista" demands inherently controversial political judgments and opinions, not verifiable facts. The Amended Complaint fails to state what facts it would prove to show the name "Castrista" is falsely applied because there is no list of verifiable facts which would do so, or which are entailed or implied by the term.

Davis's arguments to the contrary are wrong. To begin with, the trial court clearly understood and correctly applied *Milkovich*. There is nothing in his order to suggest that he did not. His order expressly states that the Marxist hypothetical in *Milkovich* was characterized as not actionable because it neither constituted, *nor implied*, any false statement of fact. The Final Judgment concludes that the language published by *La Verdad*, like that in *Milkovich*, was held "not to constitute, or imply, a statement of fact which is verifiably false." (App. 4.) Thus, Davis cannot claim the trial court's decision misunderstood *Milkovich*. Nor did the trial judge anywhere conclude *Milkovich* created a special independent privilege for opinion; rather, he applied *Milkovich* in a straightforward manner to preclude only suits in which a statement of opinion neither contained nor implied a factual connotation.

B. The Reasons For Granting The Writ And The Questions Presented For Review By The Petition Were Not Raised In The Florida Trial Court And Are Not Properly Before This Court.

In *Milkovich*, this Court held that "if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false statement of fact." 497 U.S.

at 18-19. In the trial court in this action Davis never claimed, as she does in the Petition, that the two opinion statements sued upon are actionable because they are based on the allegedly false claims that "Aruca is an agent of Castro; . . . Marazul Charters . . . belongs to Castro's government . . . that Ms. Davis's law firm was chosen by the government of the tyrant Castro . . . ." (Pet. 4-6, 12-13.) She never claimed these statements were false in her retraction demand, her two complaints, her memorandum of law in opposition to the motion to dismiss, or her oral argument to the trial court. She never made any argument predicated on their falsity, that the two statements sued upon were therefore actionable.[7] Thus, she never argued to the trial court that he should apply *Milkovich* to hold the two statements are actionable because these other statements are false. Her argument in the trial court was simply that the two statements assert false statements of fact that are libelous per se. It was only after she lost this argument in the trial court that she shifted to her new claim, arguing in the appellate court that statements not even asserted to be false in the trial court formed the predicate for her claim that the two statements sued upon are actionable because they are based on false statements of fact.

This argument fails for three reasons. First, as the Statement of the Case in this Response makes clear, the two statements sued upon, like most political opinions, are based on a host of considerations about Magda Montiel Davis, not just the statements she claims on appeal are false. Second, the fact that some of the considerations advanced as support for the opinion are mistaken (if they are), does not convert the opinions into false statements of fact, nor does it mean the opinions imply or infer

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7. Nor did she ever claim that she suffered "violent assaults" because of the statements, and that this claim should somehow be relevant to whether the statements are actionable. The Amended Complaint alleges she received telephone calls making bomb and death threats. Apparently, this is what the Petition means by "violent assaults" since no record of violent assaults exists.

those errors and are therefore actionable. Put differently, much of the South Florida Cuban exile community would consider Davis a Castrista irrespective of the truth of the statements she now claims are false. Her statements about Ros-Lehtinen, her positions on Cuban issues, her marriage to Kurzban, her trips to Cuba, her being kissed by the tyrant while calling him "teacher" are all considerations which could be marshalled in support of the opinion that she is Castrista. But that is scarcely the point. The issue is whether there are any agreed-upon verifiable facts which make one a "Castrista", or whether, like the terms "liberal", "conservative", "fascist," and "procommunist," application of this term depends on highly controversial political judgments which are not "facts" to be verified. An "opinion" or "epithet" can be "justified" or not, but it cannot be "verified."

Finally, the questions presented by the Petition are not properly before this Court because they were not presented to the Florida trial court, and thus as a matter of black letter Florida law, they were not preserved for review by the District Court of Appeal. Florida does not permit an appellant to raise new grounds for relief, or legal issues on appeal, that were not raised in the trial court. *Penn v. Florida Defense Fin. & Accounting Serv. Ctr. Auth.*, 623 So. 2d 459 (Fla. 1993); *Northeast Transp., Ltd. v. Lavender*, 643 So. 2d 1193 (Fla. 5th Dist. Ct. App. 1994), *Misty's Cafe Inc. v. Leon County*, 640 So. 2d 170 (Fla. 1st Dist. Ct. App. 1994); *Laursen v. Filardo*, 468 So. 2d 251 (Fla. 2d Dist. Ct. App. 1985). Florida law also does not permit new theories of the cause of action to be presented by the appellant on appeal. *Adamson v. First Fed. Sav. & Loan Ass'n of Andalusia*, 519 So. 2d 1036 (Fla. 1st Dist. Ct. App. 1988); *City Contract Bus Serv., Inc. v. Woody*, 515 So. 2d 1354 (Fla. 1st Dist. Ct. App. 1987); *United Bank of Pinellas v. Farmer's Bank of Malone*, 511 So. 2d 1078 (Fla. 1st Dist. Ct. App. 1987). Nor may a party shift its factual contentions on appeal to argue factual claims never made to the trial court. *Nixon v. Halpin*, 620 So. 2d 796 (Fla. 4th Dist. Ct. App. 1993).

Davis attempted without success to do all of these things in the District Court of Appeal, and now hopes to succeed in doing so in the Petition. This effort is wholly improper. Since these claims were not properly raised in the state courts below, this Court should not review them. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981), *United States v. Santana*, 427 U.S. 38, 41 n. 2 (1976), *Youakim v. Miller*, 425 U.S. 231, 234 (1976), *United States v. Mendenhall*, 446 U.S. 544, 551 n. 5 (1980); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD J. OVELMEN
Counsel of Record
BAKER & McKENZIE
Attorneys for Respondents
701 Brickell Avenue
Suite 1600
Miami, Florida 33131
(305)789-8900

APPENDIX A — COMPLAINT WITH EXHIBITS

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 92-22382

MAGDA MONTIEL DAVIS,

Plaintiff,

vs.

MARIETA FANDINO,

HILDA INCLAN,

and

MARIETA FANDINO d/b/a "*LA VERDAD*,"

Defendants.

COMPLAINT

Plaintiff, MAGDA MONTIEL DAVIS, by and through the undersigned counsel, sues the Defendants, MARIETA FANDINO, HILDA INCLAN, and MARIETA FANDINO d/b/a "*LA VERDAD*," and alleges as follows:

PARTIES AND JURISDICTION

1. This is an action for damages in excess of fifteen thousand dollars ($15,000.00).

Appendix A

2. At all times material hereto, Plaintiff MAGDA MONTIEL DAVIS ("Montiel Davis") was and is a resident of Dade County, Florida.

3. Plaintiff Montiel Davis is a licensed attorney engaged in the practice of law in Dade County, Florida.

4. At all times material hereto, Defendant Marieta Fandino was and is a resident of Dade County, Florida.

5. At all times material hereto, Defendant Hilda Inclan was and is a resident of Dade County, Florida.

6. Defendant Marieta Fandino d/b/a "*La Verdad*" is a so-called community newspaper published weekly for the Hispanic Community and distributed throughout greater Dade County, Florida by Defendant Fandino.

7. Defendant Inclan, with the intent to injure the plaintiff's business and professional reputation, wrote and published libelous and false statements about Montiel Davis in "*La Verdad.*" Defendant Fandino published these false and libelous statements in "*La Verdad*" with the intent to injure the plaintiff's business and professional reputation.

8. Plaintiff Montiel Davis served notice in writing upon the defendants on September 30, 1992, specifying the article and the statements therein which are false and defamatory and requesting that the defendants publish a retraction and apology in the newspaper in the same manner as the original publication within ten (10) days of service of the written notice or be the subject of legal action within five (5) days of service of the written notice. See correspondence attached hereto as Composite Exhibit "A."

Appendix A

9. Following the notice of intent to initiate legal action, defendants republished the false and libelous statements on October 1, 1992 in "*La Verdad*."

10. Plaintiff Montiel Davis again served notice in writing upon the defendants on October 2, 1992, specifying the article and the statements therein which are false and defamatory, and requesting that the defendants publish a retraction and apology in the newspaper in the same manner as the original publication within ten (10) days of service of the written notice or be the subject of legal action within five (5) days of service of the written notice. See Composite Exhibit "A."

11. Defendants have not retracted the false and libelous statements published on September 24, 1992 and October 1, 1992.

PRELIMINARY ALLEGATIONS

12. On or about September 24, 1992, on pages 1 and 7 of the newspaper "*La Verdad*," the defendants stated that Montiel Davis was a supporter of Fidel Castro ("Castrista"). The defendants made these statements with actual malice and knowledge that the statements were false, or with reckless disregard of whether they were false or not. See Exhibit A.

13. In addition, defendants stated that Plaintiff Montiel Davis shares office space and is an associate of Ira Kurzban, an attorney practicing law in Dade County, Florida. See Exhibit A. The defendants made these statements with actual malice and knowledge that the statement was false, or with reckless disregard of whether it was false or not.

Appendix A

14. On or about October 1, 1992, after receiving written notice of the intent to initiate legal action if the above-referenced statements of September 24, 1992 were not retracted within ten (10) days, the defendants again stated that Montiel Davis represents the interests of Fidel Castro in the United States. The defendants made these statements with actual malice and knowledge that the statement was false, or with reckless disregard of whether they were false or not.

COUNT I

Libel *Per Se*

15. Plaintiff realleges and reavers paragraphs 1 through 14 above as if fully set forth herein.

16. The statements set forth in paragraphs 12 through 14 were false and were made with actual malice and knowledge that the statements were false, or with reckless disregard of whether they were false or not, and with a will to defame the plaintiff and to injure the plaintiff in her business and professional reputation.

17. Defendants re-published the allegations after being served notice of their falsehood, and libelous and defamatory nature.

18. Because of the aforesaid acts by the defendants, Plaintiff Montiel Davis has been damaged in her good name and reputation in the community, and has suffered mental and emotional anguish and pain and suffering.

WHEREFORE, Plaintiff Magda Montiel Davis, respectfully requests this Honorable Court enter Judgment in her favor for

punitive damages, nominal and compensatory damages, and such other and further relief as this Court deems just and proper. Plaintiff requests trial by jury on all issues triable to a jury.

Respectfully submitted,

LAZARA L. BALSEIRO, P.A.
2650 S.W. 27TH Avenue, 2d Floor
Miami FL 33133
Telephone: (305) 446-1151

By: s/ Lazara Balseiro
LAZARA BALSEIRO, ESQ.
Florida Bar No. 796565

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was served upon the Defendants in this action.

s/ Lazara Balseiro
LAZARA L. BALSEIRO, ESQ.

Appendix A

EXHIBIT
NEWSPAPER ARTICLE IN *LA VERDAD*
DATED SEPTEMBER 17, 1992

LA VERDAD / Septiembre 17 de 1992 / Página 7

PRUEBA DEL VINCULO CON CASTRO
DE LA QUE RETA A ILEANA ROS

por hilda inclán

Ileana Ros-Lehtinen, la primera mujer, y la primera cubanoamericana de Miami en el Congresso de los Estados Unidos, no ha cesado de trabajar ni un instante por los cubanos y los hispanos de su área, adquiriendo cada dia que pasa una mayor popularidad entre el electorado.

Ante el Congresso de los Estados Unidos, en Washington, Ileana Ros-Lehtinen ha aprovechado cada oportunidad para defender el derecho de los cubanos a ayudar a su patria a ser libre. Sus denuncias ante el congresista demócrata de New Jersey, autor de la controversial "Ley Torricelli", para que se eliminaran del proyecto de ley las prebendas que beneficiaban económicamente a Fidel Castro, es ejemplo viviente de su combatividad.

Es conocida también su lucha por boletas electorales bilingües. ros-Lehtinen copatrocinó exitosamente una ley en el Congreso que extendió por 15 años la impresion de boletas bilingües en Dade y 67 condados más en toda la nación, donde existen más de 5% de una minoria que habla un idioma que no es el inglés. Según la ley, se imprimirán boletas bilingües por primera ves en el condado de Broward, donde residen más de 10,000 hispanos. La idea es que las minorias, ya sean haitianos,

hispanos, esquimales o indios norteamericanos, puedan ejercer el derecho al voto con pleno conocimiento ligüístico.

Ahora mismo, con la crítica situación de crisis por la que atraviesa nuestro Condado de Dade, debido al descomunal embate del huracán Andrew, el 24 de agosto, Ileana dio el paso al frente para ayudar a los hispanos. Nuestra congresista ayudó a obtener la ayuda federal, coordinada por la agencia FEMA, y organizó un seminario gratis, abierto al público, en una escuala para explicarle a los afectados — en su propio idioma español — cómo llenar las solicitudes para recibir la ayuda federal.

Incluso esta semana hemos visto a nuestra congresista en Washington echar la pelea ante el Congreso por la reconstrucción de la Base Aérea de Homestead, vital para la economia del Sur de Dade y para proteger a los Estados Unidos de un posible ataque de su principal enemigo, Fidel Castro, desde Cuba, y para ayudar en la guerra contra el narcotráfico.

Sin embargo, para las elecciones generals de noviembre, si le ha surgido una retadora a Ileana por el Partido Demócrata.

En sus primeras declaraciones a la prensa esta semana, en la Plaza de la Cubania, Magda Montiel Davis, candidata demócrata al escaño de Ros-Lehtinen, dijo estar en "desacuerdo con todo lo que Ileana representa . . ." y que estaba segura de que en Miami seria "tildada de comunista".

Bueno, si ella misma lo dice, por alogo será . . . Y si de entrada, está en contra de TODO lo que Ileana apoya, pues lógicamente está en contra de la libertad de Cuba y en favor del castro-comunismo que gobierna a la isla hoy en dia y que Ileana combate, junto a su electorado cubano.

Appendix A

Pues bien, con lo poco que conocemos de esta Montiel Davis, nos basta y not sobra para repudiarla totalmente.

En el caso cubano, a Montiel Davis sólo le interesa aumentar los envios "humanitarios" a Cuba para beneficiar a Castro. Y es lógico que así sea, ya que la principal agencia de envios a Cuba, Marazul Charters, de Pancho Aruca, es cliente de su esposo, el abogado norteamericano judio Ira J. Kurzban, cuyo apellido ella no utiliza.

En esta página reproducimos la prueba existente en la Onceava Corte Judicial del Circuito del Condado de Dade de las vinculaciones de esta arribista pro-Castrista con el tirano que lleva más de 33 años oprimiendo a nuestro pueblo.

Segun el acta oficial de la corte, record público que reproducimos aquí, en el Case Número 89-40564 CA 02, "Marazul Charters, Inc., una corporación extanjera autorizada a hacer negocios en el Estado de la Florida", le estableció un pleito a Radio Suave, en el cual el abogado de Marazul citaba a los representantes de esa emisora radial a una audiencia ante el Juez Ronald Friedman, el 3 de noviembre de 1989 a las 2 p.m.

La citación a corte aparece firmada por el esposo de Montiel Davis, Ira J. Kurzban, abogado de Marazul Charters, propiedad del del agente de Fidel Castro, Pancho Aruca. Kurzban firmó a nombre de su bufete Kurzban Kurzban and Weinger, Plaza 2650 SW 27th Avenue, Miami.

Y qué casualidad que para la esposa de Kurzban, la virtualmente desconocida magda Montiel Davis, en el asunto de Cuba, lo más imporante sea aumentar los envios de Miami a la isla, a través de Marazul Charters, por supuesto, beneficiando asi al "clente" de su esposo, y por ende, a Fidel Castro.

Appendix A

Nuestro exilio, que tanto ha sufrido por casi 35 años, no puede aceptar la representación de traidores como Montiel Davis y su esposo, que sirven al tirano Fidel Castro, a través de su agente en Miami, Francisco (Pancho) González Aruca.

Esto sólo serviría para atrasar y bloquear nuestras posibilidades de obtener una patria libre, nuestro derecho más sagrado, por el cual labora incansablemente nuestra congresista, Ileana Ros-Lehtinen.

Appendix A

EXHIBIT

TRANSLATION OF NEWSPAPER ARTICLE

La Verdad
No. 1107 SEPTEMBER 17, 1992, page 7

PROOF OF THE LINK TO CASTRO OF THE WOMAN WHO IS OPPOSING ILEANA ROS

by Hilda Inclan

Ileana Ros-Lehtinen, the first woman, and first Cuban-American from Miami, in the United States Congress, has not stopped working even one minute for the Cubans and Hispanics from her district, acquiring each day that passes greater popularity among the electorate.

In the United States Congress, in Washington, Ileana Ros-Lehtinen has taken advantage of each opportunity to defend the right of Cubans to help their country to be free. Her denunciations before the Democratic Congressman from New Jersey, the author of the controversial "Torricelli Act," so that the advantages which benefitted Fidel Castro economically be eliminated from the bill, is a living example of her fighting spirit.

She is also known for her battle for bilingual electoral ballots. Ros-Lehtinen successfully co-sponsored a law in the Congress which extended for 15 years the printing of bilingual ballots in Dade and 67 other counties throughout the nation, where there is a minority of more than 5% who speak a language other than English. Under the law, bilingual ballots will be printed for the first time in Broward County, where more than

10,000 Hispanics live. The idea is that minorities, whether they be Haitians, Hispanics, Eskimos or American Indians, can exercise the right to vote with full linguistic understanding.

Right now, with the urgent crisis situation which our Dade County is going through, due to the terrible beating by Hurricane Andrew on August 24th, Ileana took the lead in helping Hispanics. Our Congresswoman helped obtain federal aid, coordinated by the FEMA agency, and organized a free seminar, open to the public, at a school, to explain to those affected — in their own Spanish language — how to fill out applications to receive federal aid.

Just this week, we have seen our Congresswoman in Washington battle before Congress for reconstruction of Homestead Air [force] Base, vital for South Dade's economy and for protecting the United States from a possible attack of its principal enemy, Fidel Castro, from Cuba, and for helping in the war against drug-trafficking.

Nevertheless, in November's general elections, a challenger to Ileana has emerged from the Democratic Party.

In her first statements to the press this week, at the Plaza de la Cubania, Magda Montiel Davis, the Democratic candidate for Ros-Lehtinen's seat, said that she "disagrees with everything that Ileana represents . . ." and that she was sure that in Miami, she would be "branded a Communist."

Well, if she herself says so, it must be for a reason. And if, to start with, she is against EVERYTHING that Ileana supports, then logically she is against the liberation of Cuba and in favor of the Castro-communism which governs the island nowadays and which Ileana combats, together with her Cuban constituency.

Appendix A

Now then, with what little we know about this Montiel Davis, we have more than enough grounds to repudiate her completely.

On the Cuban question, Montiel Davis is only interested in increasing "humanitarian" shipments to Cuba in order to benefit Castro. And it is logical for this to be so, because the principal agency of shipments to Cuba, Marazul Charters, owned by Pancho Aruca, is a client of her husband, Jewish-American lawyer Ira J. Kurzban, whose last name she does not use.

On this page, we reproduce the proof existing in the Eleventh Judicial Circuit Court of Dade County of the links of this pro-Castro arrivists to the tyranny who has been oppressing our people for more than 33 years.

According to the official court document, a public record which we reproduce here, in Case Number 89-40564 CA 02, "Marazul Charters, Inc., a foreign corporation authorized to do business in the State of Florida," filed suit against Radio Suave, wherein Marazul's lawyer summoned the representatives of that radio station to a hearing before Judge Ronald Friedman on November 3, 1989, at 2 p.m.

The summons is signed by Montiel Davis's husband, Ira J. Kurzban, the lawyer for Marazul Charters, owned by Fidel Castro's agent, Pancho Aruca. Kurzban signed on behalf of his law firm, Kurzban Kurzban and Weinger, Plaza 2650 SW 27th Avenue, Miami.

And what a coincidence that for Kurzban's wife, the virtually unknown Magda Montiel Davis, on the subject of Cuba, what is most important is increasing shipments from Miami to the

island, through Marazul Charters, of course, thus benefitting her husband's "client," and, ultimately, Fidel Castro.

Our exile community, which has endured so much for nearly 34 years, cannot accept the representation of traitors such as Montiel Davis and her husband who serve the tyrant Fidel Castro, through his agent in Miami, Francisco (Pancho) González Aruca.

This would only serve to delay and block our possibilities of obtaining a free country, our most sacred right, for which our Congresswoman, Ileana Ros-Lehtinen, works tirelessly.

[copy of Notice of Hearing of the Circuit Court of the 11th Judicial Circuit in Dade County, dated September 24, 1989, in English.]

Appendix A

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

BEFORE ME, A NOTARY PUBLIC IN AND FOR THE STATE OF FLORIDA AT LARGE, PERSONALLY APPEARS DR. *LUIS A. DE LA VEGA – VICE PRES.* FOR AND ON BEHALF OF PROFESSIONAL TRANSLATING SERVICES, WHO, AFTER BEING DULY SWORN, DEPOSES AND SAYS THAT (S)HE IS FULLY VERSED IN THE *SPANISH* AND THE ENGLISH LANGUAGES, AND THAT THIS IS A TRUE AND CORRECT TRANSLATION OF THE ATTACHED DOCUMENT CONSISTING OF *2* PAGE(S), AND THAT THIS IS THE LAST OF THE ATTACHED.

s/ Luis A. De La Vega, Vice Pres.

SWORN TO AND SUBSCRIBED THIS *11th* DAY OF *April*, A.D., 19*94*.

s/ Angela Smith
NOTARY PUBLIC, STATE OF FLORIDA
AT LARGE

MY COMMISSION EXPIRES: 12-27-96 [SEAL]

The utmost care has been taken to ensure the accuracy of all translations. Profession Translating Services and its employees shall not be liable for any damages due to its own negligence or errors in typing or translation, nor shall it be liable for the negligence of third parties.

APPENDIX B — PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS DATED OCTOBER 17, 1994

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 92-22382 CA 30

MAGDA MONTIEL DAVIS,

Plaintiff,

vs.

MARIETA FANDINO, HILDA INCLAN, and MARIETA FANDINO d/b/a *LA VERDAD*,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Magda Montiel Davis' Amended Complaint has alleged facts sufficient to state a claim for libel against Defendants in this action, and Defendants' Motion to Dismiss must be denied. Contrary to Defendants' Memorandum of Law, the Amended Complaint meets the constitutional requirements of adequately pleading the falsity of Defendants' statements and Defendants' malice in making them. Defendants' argument that they qualify for a constitutional exemption from suit for media

defendants is wholly unsupported. Moreover, the Amended Complaint properly states a claim for punitive damages under Florida law. Finally, none of the grounds for dismissal that Defendants assert in their Motion to Dismiss—most of which they failed to brief — warrants dismissal, and each must be denied as a matter of law.

ARGUMENT

I. PLAINTIFF MAGDA MONTIEL DAVIS HAS MET THE REQUIREMENTS OF THE FIRST AMENDMENT TO THE U.S. CONSTITUTION BY PLEADING ADEQUATELY THE FALSITY OF DEFENDANTS' STATEMENTS AND THEIR ACTUAL MALICE IN DOING SO.

The First Amendment to the U.S. Constitution does not shield the Defendants' defamatory statements from Montiel Davis' suit for libel. Montiel Davis has met the constitutional requirements of adequately alleging the falsity of Defendants' statements and their actual malice in doing so. In Part A of their argument, Defendants merely place their faith in the talismanic incantation "rhetorical hyperbole" to ward off this suit. This argument fails because the Constitution affords publishers no blanket exemption from defamation suits — even ones by public figures arising out of matters of public concern—simply because the defamatory speech qualifies as "political."

Instead, the Defendants must show that Montiel Davis has not met the constitutional requirements in this case, but Part B of Defendants' argument fails to do so. Defendants' two-sentence "analysis" merely asserts that Montiel Davis has failed adequately to plead falsity and malice. Because Defendants' have

not shown — and could not show — that Montiel Davis has failed to meet constitutional pleading requirements, their motion to dismiss on First Amendment grounds must be denied as a matter of law.

A. The Defendants' Defamatory Statements Are Actionable Under the First Amendment, Which Offers No Blanket Exemption from Libel Suits for "Political" Speech.

Defendants devote Part A of their Memorandum of Law to misconstruing First Amendment libel doctrine. In an "analysis" that rivals the one in Part B for superficiality, Defendants assert that "[t]he statements sued upon here clearly fall within the ambit of protection afforded political speech by the First Amendment." Defendants' Memorandum of Law ("Memo.") at 5. They deduce that dismissal is necessitated by "a long line of Supreme Court decisions [that have been] highly protective of defamatory political speech." *Id.* Defendants' claim their libelous attack was merely another instance of "rhetorical hyperbole common to political campaigns," *id.* at 4, and incredibly claim that if "Defendants [had] stated that the Plaintiff should be defeated in her election because she is an out-an-out Marxist, the publication still would not be actionable." *Id.* at 5. In other words, Defendants argue that the First Amendment permitted them without limit to bespatter Montiel Davis with whatever kind of defamatory untruths they could think up as long as their statements had some political content.

Defendants' assertions are simply in error and ignore the long-standing rule that the First Amendment does not protect libelous speech, even in a political context. There is no catch-all exemption from suit in First Amendment doctrine for political speech, as they suggest. As the United States Supreme Court has

held, the First Amendment affords Defendants no protection where they have made defamatory, false statements of fact, *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767, 775, 106 S. Ct. 1558, 1563 (1986), with actual malice. *New York Times v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 726 (1964). This is true regardless of any content of public concern, *id.*, or that the defamed person is a public figure. *Curtis Publishing Co. v. Butts*, 338 U.S. 130, 164-65, 87 S. Ct. 1975, 1996 (1967). As the Court has noted, "The need to avoid self-censorship by the news media is, however, not the only societal value at issue . . . [or] this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Gertz v. Robert Welch. Inc.*, 418 U.S. 323, 341, 94 S. Ct. 2997, 3007 (1974).

Thus, Defendants' argument in Part A that their statements do not constitute actionable libel is wholly without precedent in the First Amendment jurisprudence of the Supreme Court. While it remains true that *New York Times* seeks to protect "uninhibited, robust, and wide-open" debate on public issues, 376 U.S. at 270, 84 S. Ct. at 721, *New York Times* specifically permits suit for libelous statements against public officials. Defendants' mere assertions that their defamatory statements were of the protected type do not make it so. Instead, defendants gloss over the limitations of falsity and actual malice on defamatory political speech; their characterizations make it sound as if they were merely engaged in a light-hearted romp at Montiel Davis' expense, without any real consequences. See Memo. at 5. Defendants even go so far as to suggest that their statements would not be actionable even if "Defendants [had] stated that the Plaintiff should be defeated in her election because she is an out-and-out Marxist." *Id.* at 7. *New York Times* and its progeny, however, clearly would not protect these Defendants' malicious

dissemination of a blatant falsehood, such as that Montiel Davis is "an out-and-out Marxist," even if their opinion that Montiel Davis should not be elected is not actionable. In fact, the Florida Supreme Court has held that to accuse someone of being a communist is defamation per se. *Joopanenko v. Gavagan*, 67 So.2d 434 (Fla. 1953).

At best, Defendants' argument in Part A is irrelevant because it fails, as it must, to show that political speech is generally exempted from suit for libel, or that their statements in particular are not actionable. To the contrary, the Defendants' statements are actionable as long as Montiel Davis adequately pleads, as she has, and ultimately proves those statements' falsity and the Defendants' actual malice. *Hepps* 475 U.S. at 775, 106 S. Ct. at 1563; *New York Times*, 376 U.S. at 280, 84 S. Ct. at 726.

B. Montiel Davis Has Met the Constitutional Requirements of Adequately Pleading the Defendants' Actual Malice and the Falsity of Their Statements.

The real constitutional issue that Defendants' motion to dismiss raises is not whether Defendants' statements are per se exempt from suit under the First Amendment, but whether Montiel Davis has adequately pleaded the elements of falsity and actual malice that the Constitution requires. Montiel Davis has pleaded facts sufficient, when proven, to establish each element of libel, notwithstanding Defendants' contentions to the contrary.

Once again substituting bare assertion for argumentation, Part B of Defendants' Memorandum of Law does not afford the court any basis for dismissal of Montiel Davis' suit. As in Part A, Part B consists of several pages of block quotes to which the following analysis/conclusion is appended:

Appendix B

> The Amended Complaint contains no allegations which if proven would establish the statements published are false. The Amended Complaint likewise contains no factual allegations which if proven would establish that Defendant know [*sic*] the statements sued upon are false, or entertained serious doubts as to their truth when they published this.

Memo. at 10. Though the United States Supreme Court has certainly been concerned not to chill the political speech rights of media defendants, it has never held that a plaintiff's libel suit should be dismissed on the defendant's mere assertion that plaintiff has failed to allege falsity and actual malice. That is apparently what Defendants here seek to persuade this court to do.

But aside from whatever position the Defendants advocate, their Motion to Dismiss must fail for the simple reason that Montiel Davis has pleaded facts which, when proven, will establish falsity and actual malice (as well as the elements of defamation in Florida, see Part III.A, B). Taking all of the allegations of the Amended Complaint as true, as the court must, *Florida Medical Center Inc. v. New York Post Co. Inc.*, 568 So.2d 454, 458-59 (Fla. 4th DCA), *reh'g denied*, 581 So.2d 1309 (1990), Montiel Davis' complaint clearly alleges that the Defendants' statements were false and susceptible to proof or disproof in ¶¶ 24, 27, and 28. Moreover, she also alleged throughout the complaint that, in the South Florida area, the Defendants' statements would be understood by the Cuban community as representations of fact and not opinion. See Amended Complaint at ¶¶ 19-21, 26, and 33. Finally, the

retraction letters that Montiel Davis sent to the Defendants also specified the false statements that defamed her. See Amended Complaint at ¶ 7 (Composite Exhibit "A").

Similarly, Montiel Davis' Amended Complaint also adequately alleges actual malice. Actual malice in the libel context means knowledge that a statement is false, or reckless disregard as to whether a statement is false, *New York Times*, 376 U.S. at 279-80, 84 S. Ct. at 726, or "serious doubt" as to the truth of a publication. *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325 (1968). The Amended Complaint states in numerous places that the Defendants purposefully made the statements, knowing and intending that in the political context of South Florida and the Cuban community, that the statements would be taken as representations of fact that would discredit and defame Montiel Davis. See Amended Complaint at ¶¶ 19-21, 24-26, and 33. This is confirmed by the Defendants' use of terms like "Castrista," which is facially derogatory in the Cuban community, and which bear no relation to Montiel Davis' political views. See Amended Complaint (Composite Exhibit "B").

Defendants' summary conclusion that the Amended Complaint contains no factual allegations supporting actual malice is therefore baseless. See Memo. at 10. Moreover, Defendants are apparently unaware that the U.S. Supreme Court has held that discovery into a media defendant's state of mind and its editorial process is not barred by the First Amendment. *Herbert v. Lando*, 441 U.S. 153, 170-71, 99 S. Ct. 1635, 1645 (1979). Thus, even if Montiel Davis' allegations with regard to actual malice are deficient — which she does not concede — she should still be allowed to pursue direct evidence of actual malice through discovery, having alleged the Defendants' actual malice in her amended Complaint.

Appendix B

In sum, Defendants' constitutional arguments for dismissal of the complaint must be rejected. They have failed to show that their statements were protected speech of a political nature, just as they have without merit asserted that Montiel Davis did not adequately plead falsity and actual malice.

II. MONTIEL DAVIS' CLAIM FOR PUNITIVE DAMAGES SHOULD NOT BE DISMISSED OR STRUCK BECAUSE PUNITIVE DAMAGES ARE PERMITTED IN FLORIDA INTENTIONAL TORT CASES IN WHICH MALICE IS AN ESSENTIAL ELEMENT OF THE TORT, AND FLORIDA STATUTE § 768.72 PROVIDES NO BASIS TO DISMISS OR STRIKE THE CLAIM.

Defendants' final claim in Part C of its Memorandum of Law is that Florida Statutes § 768.72[1] bars Montiel Davis' claim for punitive damages because the "Amended Complaint proffers no evidence establishing actual malice and express malice, both of which are required to obtain punitive damages in a Florida public

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1. F.S.A. § 768.72 provides:

> In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend his complaint to a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial net worth shall proceed until after the pleading concerning punitive damages is permitted.

figure libel suit." Memo. at 11. Defendants are wrong for three reasons.

First, Florida courts have held that "punitive damages are always recoverable in intentional tort cases where malice is one of the essential elements of the tort. The underlying rationale for this rule is that the proof of malice required to make out the cause of action is also sufficient evidence of malice on the part of the defendant to permit the jury to award punitive damages as punishment." *Ciamar Marcy, Inc. v. Monteiro Da Costa,* 508 So.2d 1282 (Fla. 3d DCA 1987); see also *Cardenas v. Miami-Dade Yellow Cab Co.,* 538 So. 2d 491, 494 (Fla. 3d DCA 1989) (approving punitive damages upon a showing of malice for false imprisonment). Since *New York Times* requires public figure plaintiffs suing media defendants for libel to prove actual malice, 376 U.S. at 180, 84 S. Ct. at 726, Montiel Davis' claim for punitive damages should be allowed.

Second, to dismiss or strike Montiel Davis' punitive damages claim would require the court to blind itself to the third sentence in § 768.72, which states, "The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages." As stated in Part I, *supra*, Montiel Davis has sufficiently pleaded facts of actual malice with respect to constitutional requirements, and dismissal on that ground is inappropriate. If that is true, then it would be premature and a narrow reading of the rules of civil procedure to strike the punitive damages claim at this stage of litigation merely because the "Amended Complaint proffers no evidence establishing actual malice and express malice." Memo. at 11. Moreover, the language of the statute itself — "reasonable showing by evidence in the record or proffered by the claimant"

— contemplates the striking of punitive damages claims only at trial, or at least until such time as discovery has progressed to the point that the plaintiff should have been able to prove malice.

The last reason Defendants are wrong that Montiel Davis' punitive damage claim should be struck or dismissed is that to do so now under the authority of § 768.72 would cause a conflict with F.S.A. § 770.02, which limits a plaintiff to recovery of actual damages

> if it appears *upon the trial* that [the defamatory statement] was published in good faith; that its falsity was due to an honest mistake of the facts; that there were reasonable grounds for believing that the statements . . . were true; *and* that, within the period of time specified in subsection (2), a full and fair correction, apology, or retraction was . . . published.

F.S.A. § 770.02(1) (emphasis added). Section 770.02(1) clearly contemplates limiting the plaintiff to actual damages only upon *trial*, not upon the initial pleadings. Moreover, since Defendants never published a correction, apology, or retraction, see Amended Complaint at ¶¶ 7-8, § 770.02 permits Montiel Davis' recovery of punitive damages. To dismiss or strike the claim under § 768.72 would therefore require the court to read the two statutes together in an inconsistent manner.

For all of the above reasons, Defendants' motion to dismiss or strike Montiel Davis' punitive damages claim should be denied.

Appendix B

III. THE OTHER GROUNDS FOR DISMISSAL THAT DEFENDANTS' RAISED IN THEIR MOTION, BUT WHICH THEY DID NOT ADDRESS IN THEIR MEMORANDUM OF LAW, PROVIDE NO BASIS FOR DISMISSAL OF MONTIEL DAVIS' AMENDED COMPLAINT.

Aside from the constitutional and punitive damages issues raised in their Motion to Dismiss, Defendants did not brief the other grounds for dismissal that they alleged in their motion. It is unclear whether Defendants' failure to do so constitutes an abandonment of those claims based on an implicit acknowledgement of their lack of merit, or whether Defendants nevertheless intend to raise those grounds upon the hearing on the motion. Whatever the case, none of those grounds warrant dismissal of the Amended Complaint. Each is addressed in order.

A. Florida Recognizes Causes of Action for Libel Se, and the First Count of the Amended Complaint Has Stated Such a Cause of Action.

Defendants' assertion that "Florida law no longer recognizes a cause of action for 'libel per se' by a 'public figure' against media defendants" is wrong. Motion to Dismiss ("Motion") at ¶ 1. A number of Florida cases have squarely addressed the issue and have reversed dismissals predicated on the ground that Defendants urge.

In *Mid-Florida Television Corp. v. Boyles*, 467 So.2d 282, 283 (Fla. 1985), the Florida Supreme Court held that the U.S. Supreme Court's decision in *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 94 S. Ct. 2997 (1974), did not abrogate the common law cause of action for "libel per se" where a private person was suing

a media defendant. *Gertz* held, *inter alia*, that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard of the truth" — that is, actual malice. 418 U.S. at 349, 94 S. Ct. 3011. Before *Gertz*, however, damage and liability could be presumed conclusively as a matter of law from words amounting to libel per se, without pleading or proving them. See *Mid-Florida*, 467 So.2d at 283. Nevertheless, the *Mid-Florida* Court stated that "for purposes of pleading in a negligence action against the media, labeling an action libel per se remains a useful shorthand for giving notice that the plaintiff is relying upon the words sued upon as facially defamatory, and therefore actionable without resort to innuendo." *Id.*

Florida appellate courts have held that plaintiffs had stated causes of action for libel per se in other contexts as well. In one instance, the Fifth District Court of Appeal held that a public figure had stated a libel per se claim based on a satirical poem that arguably referred to her as a "hooker." *Ford v. Rowland*, 562 So.2d 731, 735 (Fla. 5th DCA 1990). In another case, a newspaper employee had stated a libel per se claim against the newspaper for sending an ambiguous letter to a reader that reasonably could have been interpreted to imply facts imputing improper conduct to the employee. *Perry v. Cosgrove*, 464 So.2d 664, 666 (Fla. 2d DCA 1985).

Clearly, Florida courts recognize claims of libel per se, and Montiel Davis' Amended Complaint has stated such a claim. A publication is per se libelous if,

> when considered alone without innuendo, it tends to subject a person to hatred, disgust, ridicule, contempt, or disgrace, or tends to

> injure him in his trade or profession, or if it imputes to another conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession, or office.

Id. Aside from adequately alleging falsity and actual malice, as explained in Part I.B., *supra*, Count I of the Amended Complaint also sufficiently alleges that Defendants published statements that are libelous per se under this definition. Count I alleges that the statements are facially defamatory, ¶ 23, and injured Montiel Davis in her personal, professional, and public life, ¶¶ 24-26, 29-30, by subjecting her to public hatred, ridicule, humiliation and contempt, ¶¶ 25-26, 29, as they were intended to do.

Thus, the Motion to Dismiss for alleging a non-cognizable claim must be denied.

B. The Amended Complaint and the Retraction Letter Clearly Specified the False Statements that Defamed Montiel Davis, and Montiel Davis Has Complied with Florida's Retraction Statutes Prior to Bringing Suit.

Florida Statutes §§ 770.01 and 770.02 require that a libel plaintiff provide notice to a publisher prior to bringing suit, so that the publisher may retract the defamatory statement within the statutorily allotted time. *See* F.S.A. §§ 770.01, 770.02. Montiel Davis complied with the notification requirement by written requests for retraction on September 30, 1992 and October 2, 1992. Amended Complaint at ¶ 7 (Composite Exhibit "A"). The Amended Complaint generally avers compliance with the retraction statute, and therefore the complaint is sufficient in that respect to survive dismissal for failure to comply with a

condition precedent. See *Edward L. Nezelek v. Sunbeam Television Corp.*, 413 So.2d 51, 56 (Fla. 3d DCA 1982) (requiring general averment of compliance with condition precedent to state a cause of action).

Defendants allege, however, that the Amended Complaint and retraction letters failed to specify which statements were false and defamatory. Motion at ¶ 2. Adequate notice must specify the article and the statements alleged to be false and defamatory, *Gannet Fla. Corp. v. Montesano*, 308 So.2d 599, 599-600 (Fla. 1st DCA 1975), and must be specific enough to enable a defendant to retract any allegedly false statements and thus to mitigate the harm caused by those statements. *Cook v. Pompano Shopper Inc.*, 582 So.2d 37, 39 (Fla. 4th DCA 1991). Even a superficial examination of Montiel Davis' retraction letters, attached to the complaint as Composite Exhibit "A," reveals that the Defendants' assertion is baseless. The retraction letter specifically referred to the terms and allegations that Defendants' employed in their publication, leaving no ambiguity as to the false and defamatory statements. Defendants simply chose, however, to ignore the retraction demand.

Furthermore, inasmuch as the purpose of requiring a specific statement of the false and defamatory material is to identify to the publisher which statements are defamatory so that the publisher can address its retraction to those statements, Defendants' attempt to dismiss the Amended Complaint for lack of specificity rings hollow. See *Cook*, 582 So.2d at 39. If the Defendants had any intention of retracting their statements upon receipt of the notice, one might reasonably have expected them to have requested a clarification of the specific statements that apparently they found too vague. But since Defendants completely ignored the retraction demand, they cannot be heard to claim lack of specificity at this juncture.

Defendants' Motion to Dismiss on this ground must be denied.

C. The Amended Complaint States Causes of Action for Libel Based on Defendants' Malicious Publication of False Statements That Defamed Montiel Davis, Regardless of Whether They Are Characterized as "Fact" or "Opinion."

In another ground for dismissal that Defendants did not brief in their Memorandum of Law, Defendants again misleadingly assert that the Amended Complaint should be dismissed for a reason that is unsupported by legal precedent. Defendants claim that "[t]he Amended Complaint fails to state a cause of action to the degree it is intended to address statements of opinion and not false statements of verifiable fact." Motion at ¶ 3. Though prior Florida case law suggested the distinction between "fact" and "opinion" may be meaningful,[2] the U.S. Supreme Court has recently squarely held otherwise, and therefore the Amended Complaint states a cause of action regardless of whether the statements that defamed Montiel Davis are labelled "fact" or "opinion."

The U.S. Supreme Court addressed the legal distinction between statements of fact and opinion in *Milkovich* and "were not persuaded that . . . an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." 110 S. Ct. at 2707. The Court reasoned that an opinion exemption, besides being contrary to the "tenor and context" of prior precedent,

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2. See, e.g., *Zambrano v. Devanesan*, 484 So.2d 603, 606 (Fla. 4th DCA), *reh'g and cert. denied*, 494 So.2d 1150 (Fla. 1936) ("[T]he law recognizes that some comments may be pure expressions of opinion whereas others may be mixed expressions of opinion.")

"would also ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Id.* at 2705. After further elaboration, the Court concluded that existing constitutional doctrine is adequate to protect free expression "without the creation of an artificial dichotomy between 'opinion' and fact." *Id.* at 2706.

The Court then summarized its jurisprudence with respect to actionable opinions, stating first that *Hepps* requires that statements on matters of public concern must contain "provably false factual connotations" before they are actionable against a media defendant. *Id.* Another line of cases stands for the proposition that statements that cannot reasonably be interpreted as stating actual facts ("rhetorical hyperbole") about an individual are not actionable. *Id.* (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S. Ct. 876, 879 (1988)). Finally, the actual malice requirement of *New York Times*, *Butts*, and *Gertz* ensures that speech relating to matters of public concern will remain "uninhibited, robust, and wide-open," since publishers cannot be held liable for statements on matters of public concern that reasonably imply false and defamatory facts regarding public figures or officials without the proper showing of intent. *Id.* at 2706-07.

Against this backdrop, Defendants' contention that the Amended Complaint should be dismissed to the extent that it addresses statements of opinion hardly requires a response. See Motion at ¶ 3. The question of Defendants' liability turns not on whether their statements were opinion, but whether the statements contain "provably false factual connotations." *Milkovich*, 110 S. Ct. at 2706. Under the Supreme Court's precedents, the only instance in which Defendants would not be subject to liability upon adequate pleading and proof is where

their statements could not reasonably be interpreted as stating actual facts about Montiel Davis. *Falwell*, 485 U.S. at 50, 108 S. Ct. at 879. But as the *Ford* court stated, "[i]f a publication reasonably asserts a factual charge which is defamatory, even in a humorous or satirical vein, we are unaware of any first amendment protection." 562 So.2d at 735.

The Defendants' defamatory statements contain assertions that, reasonably interpreted, contain provably false facts and factual connotations. The Defendants asserted that Montiel Davis was a supporter of ideas, persons, and entities of which and whom she has never been a supporter. See Amended Complaint (Composite Exhibit "B"). They stated these facts in an objective manner and stated that, "as we receive these documents and we verify them, we publish them for the information of the voters." See Amended Complaint (Composite Exhibit "B," translation of October 1 edition of *La Verdad*). In determining whether the statements contain actionable factual assertions, "the court must consider the context in which the statement was published, the medium by which it was disseminated, and the recipient audience." *Ford*, 562 So.2d at 735. Given the context (congressional campaign), the medium (front page of a newspaper widely disseminated in the Cuban community), and the recipient audience (hostile to perceived political enemies), it is clear that Defendants had a strong motive to lead their readers to believe that what they printed about Montiel Davis was true, not "rhetorical hyperbole." They cannot now be heard to argue that their statements were mere statements of opinion without factual content.

Defendants' Motion to Dismiss must be denied on the ground that their statements were mere "opinion."

D. The Amended Complaint Pleads Facts Sufficient to State a Cause of Action for Libel Against Defendants.

Without belaboring the point any further, the foregoing has made abundantly clear that Montiel Davis has stated a cause of action for libel. The Amended Complaint adequately pleads facts that, when proved, will establish the statements' falsity and Defendants' malice, see Part I, as well as common law defamation. Part III.A, B. The court is merely reminded that on a motion to dismiss, the court must take as true all well-pled allegations of the complaint. *Florida Medical Center*, 568 So.2d at 458-59.

The Defendants' motion to dismiss on this ground must be denied.

E. The Amended Complaint States a Cause of Action for Libel Against Defendants Because It Properly Alleges Defamatory Statements of Fact.

Here, too, little could be added that has not already been said above. See Part III.B. It should be noted, however, that it would be inappropriate to decide the issue of defamation as a matter of law on a motion to dismiss. Except where a publication can bear only one meaning, a statement that is ambiguous and reasonably susceptible of a defamatory meaning is for the trier of fact to decide. See *McIver v. Tallahassee Democrat, Inc.*, 489 So.2d 793, 794 (Fla. 1st DCA), *rev. denied*, 500 So.2d 544 (Fla. 1986); *Perry*, 464 So.2d at 666. All of the statements that Montiel Davis has alleged in the Amended Complaint are reasonably susceptible of a defamatory meaning and should go to the jury. Therefore, the Motion to Dismiss must be denied.

Appendix B

F. There Is No News Privilege Under the Florida Constitution, the United States Constitution, or Common Law That Bars the Amended Complaint.

As argued at length in Part I, *supra*, there is no privilege under the United States Constitution that exempts Defendants from this suit. Moreover, Defendants have not argued that any privilege under the Florida Constitution or common law bars this suit, and Plaintiff is unaware of any. The Motion to Dismiss must be denied on this ground.

G. The Amended Complaint Properly Pleads a Claim for Punitive Damages Under Florida Statute § 768.72.

Montiel Davis' claim for punitive damages should not be dismissed or struck because punitive damages are permitted in Florida intentional tort cases in which malice is an essential element of the tort, and Florida Statute 768.72 provides no basis to dismiss or strike the claim. See Part II, *supra*. The motion to dismiss or strike the claim must be denied.

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CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss must be denied.

DATED: this 14th day of October, 1994.

Respectfully submitted,

IRA J. KURZBAN, ESQ.
KURZBAN KURZBAN & WEINGER P.A.
2650 SW 27th Avenue, 2nd Floor
Miami, Florida 33133
Telephone: (305) 444-0060
By: s/ Ira J. Kurzban
IRA J. KURZBAN, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to Richard J. Ovelmen, Esq. at Baker & McKenzie, Suite 1600, Barnett Tower, 701 Brickell Avenue, Miami, Florida, 33131 on this 14th day of October, 1994.

s/ Ira J. Kurzban
IRA J. KURZBAN, ESQ.

APPENDIX C—DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FILED OCTOBER 12, 1994

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 92-22382

MAGNA MONTIEL DAVIS,

Plaintiff,

versus

MARIETA FANDINO, HILDA INCLAN, and MARIETA FANDINO D/B/A "LA VERDAD,"

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendants, Marieta Fandino, Hilda Inclan, and Marieta Fandino d/b/a "La Verdad", submit this memorandum of law in support of their motion to dismiss the Amended Complaint. The motion should be granted because (i) as a matter of federal constitutional law the statements sued upon are expression protected by the First Amendment and are therefore not actionable; (ii) even were the statements actionable, the Complaint fails to allege facts which if proven would establish the essential elements of a libel suit by a "public figure" against a media defendant regarding matters of legitimate public concern; and (iii) no evidence has been submitted or proffered which would justify an award of punitive damages.

Appendix C

Statement of Relevant Factual Allegations[1]

The Spanish language weekly newspaper *La Verdad* is alleged to have published on September 24, 1992 and October 1, 1992[2] political opinion columns in Spanish which the Amended Complaint claims state that Montiel Davis "was a supporter of Fidel Castro ('Castrista')" and that she "represents the interests of Fidel Castro in the United States" (Amended Complaint, ¶ 18, ¶ 20, Composite Exhibit B.)

On September 30, 1992, Plaintiff's counsel sent Defendants a retraction demand pursuant to Section 770.01 which purported to identify the specific statements in these two publications which are false and defamatory. (Amended Complaint, Composite Exhibit A).

Despite the length and verbosity of the Amended Complaint, it pleads only the legal conclusion that Defendants published these allegedly defamatory statements with "actual malice," that is with "knowledge of their falsity or reckless disregard of the truth." No facts are plead which if proven would establish this essential legal element of a public figure libel suit against a media defendant. These conclusory allegations in their entirety are:

> 19. The Defendant made the statements with actual malice and knowledge that their

---

1. Since this is a memorandum in support of a motion to dismiss, the factual allegations of the Amended Complaint are assumed *arguendo*, for the purposes of this Motion only, to be correct.

2. Defendants note the original complaint included a September 17, 1992 publication in *La Verdade* in its composite Exhibit B, but no claim has been asserted as to this publication.

statements would be perceived by the Cuban community, under the circumstances under which they were made, in the context in which they were made by Defendants, and in their totality, as allegations of fact that Montiel Davis had membership in organizations and well-defined political affiliations and beliefs, contrary to the Cuban community, and that the statements were false or with reckless disregard as to their truthfulness.

* * *

21. That the statements made by Defendants labeling Montiel Davis a "Castrista," and a representative of Castro in the United States, were made with express malice and knowledge that the statements were false or with reckless disregard as to their truthfulness and with the primary motive to injure Montiel Davis, rather than the conduct news reporting or protect any proper interest, knowing that in the medium and circumstances in which it was disseminated its audience would perceive such publication as statements of fact.

ARGUMENT

A candidate for public office is a "public figure" under controlling decisions of the United States Supreme Court, and publications concerning political candidates are the most highly

protected of all political expression. The First Amendment guarantees that such political speech is free to be vituperative, vehement, rhetorical, hyperbolic, and caustic. Expression such as that sued upon here is thus not actionable.

Even were this not the case, a "public figure" libel plaintiff in a suit against the media involving expression of public concern must plead and prove with clear and convincing evidence the statements published are "of an concerning" her, are false, defamatory, and were published with knowledge of their falsity or with serious doubts as to their truth.

The pleading requirements of Florida law mandate that a complaint at least allege facts which if proven would establish each element of the tort. The pleading of mere legal conclusions is not sufficient. The Amended Complaint fails to allege any facts which if proven would establish falsity or knowledge of falsity. It does no more than plead these conclusions.

Finally, the Amended Complaint does not proffer evidence or any factual basis to support the pleading of a claim for punitive damages.

A. The Statements Sued Upon Are Not Actionable Under The First Amendment.

Expression concerning candidates for political office is the speech most highly protected by the First Amendment. Political debate is to be "wide-open and robust;" and criticism of candidates for public office is expected to be "caustic, vituperative, and rife with rhetorical hyperbole or vigorous epithet". *Milkovich v. Lorain Journal Co.*, 497 U.S. 16-17 (1990); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Letter*

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Carriers v. Austin, 418 U.S. 264 (1974); *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970); *Ocala Star-Banner Company v. Damron*, 401 U.S. 295 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

In *Milkovich*, the Supreme Court explained that for a public figure to state a claim for libel against a media defendant for publishing expression relating to a matter of public concern, the plaintiff must, among other things, plead and prove a false statement of fact. Expressions of opinion which do not amount to statements of verifiable fact are not actionable. The Court also noted that statements of rhetorical hyperbole common to political campaigns have long been ruled to be not actionable. In fact, the Court expressly held that statements far more extreme than those which are sued upon here are not actionable:

> Foremost, we think Heeps stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant in involved. ***Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable.*** Hepps ensures that a statement of opinion relating to matters of public concern which does not contain a provable false factual connotation will receive full constitutional protection.

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> Next, the Bresler-Letter Carriers-Falwell line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. *Falwell*, 485 U.S., at 50, 99 L Ed 2d 41, 108 Ct. 876. This provides assurances that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. See id., at 53-55, 99 L Ed 2d 41, 108 S Ct 876.

497 U.S. 19-20. (Emphasis Added)

In short, had Defendants stated that the Plaintiff should be defeated in her election because she is an out-and-out Marxist, the publication still would not be actionable.

As *Milkovich* explains, this result follows from a long line of Supreme Court decisions highly protective of defamatory political speech. In *Greenbelt Cooperative Publixhing Assoc.*, *supra*, the Court held that accusing a public official of "blackmail" was not actionable, but rather was no more than vigorous epithet used to charactize his negotiating tactics. In *Letter Carriers v. Aust, supra,* use of the term "traitors" to refer to nonunion workers was held not actionable. In *Hustler, supra,* a political cartoon suggesting the plaintiff's first sexual experience was the act of incest with his mother in an outhouse was not actionable.

The statements sued upon here clearly fall within the ambit of protection afforded political speech by the First Amendment. The articles does no more than state in hyperbolic terms that the

plaintiff's views in the author's opinion are much too sympathetic to the Castro regime. The Amended Complaint must be dismissed.

B. The Amended Complaint Fails to Allege Any Facts Which If Proven Would Establish The Articles Were False or Published With Knowledge Of Their Falsity.

Under controlling decisions of the United States Supreme Court, a candidate for public office is a "public figure" libel plaintiff. *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Ocala Star-Banner Company v. Damron*, 401 U.S. 295 (1971). As the Court in *Monitor Patriot* held:

> This case went to the jury in December 1966, after our decisions in New York Times and Garrison, but before Curtis and Greenbelt. The trial judge instructed the jury that Roy, as a candidate for elective public office, was a "public official," and that characterization has not been challenged here. Given the later cases, it might be preferable to categorize a candidate as a "public figure," if for no other reason than to avoid straining the common meaning of words. But the question is of no importance so far as the standard of liability in this case in concerned, for it is abundantly clear that, whichever term is applied, publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. That New York

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> Times itself was intended to apply to candidates, in spite of the use of the more restricted "public official" terminology, is readily apparent from that opinion's text and citations to case law. And if it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484, 1 L Ed 2d 1498, 1506, 77 S Ct 1304, then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

The burden of proof on a public figure libel plaintiff is heavy indeed. She must plead and prove facts demonstrating that the allegedly actionable statements are of and concerning her, are false, are defamatory, and were published with knowledge of their falsity or reckless disregard of their truth or falsity. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991); *Milkovich, supra; Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986). As *Masson, supra*, summarized the law:

> The First Amendment limits California's libel law in various respects. When, as here the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with "knowledge that it

was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S.254, 279-280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author "in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), or acted with a "high degree of awareness of . . . probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964).

Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. See *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970). We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputations and we continue to do so here. But the term can confuse as well as enlighten. In this respect, the phase may be an unfortunate one. See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666, n. 7, 109 S.Ct. 2678, 2685, n. 7 105 L.Ed. 2d 562 (1989). In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity. This

> definition principle must be remembered in the case before us.

111 S.Ct. at 2429-30.

The pleading requirements of Florida law include the obligation to plead facts which if proven would establish each essential element of the cause of action. *Chris Craft Industries, Inc. v. Van Valkenburg*,267 So. 2d 642 (Fla. 1972); *Ellison v. City of Fort Lauderdale*, 175 So.2d 198 (Fla. 1965); *Rios v. McDermott, Will & Emery*, 613 So.2d 544 (Fla. 3d DCA 1993); *Arky, Freed, et al. v. Bowman Instrument*, 527 So.2d 211 (Fla. 3d DCA 1987); *Bliss v. Carmone*, 418 So.2d 1017 (Fla. 3d DCA 1982), *Clark v. Boeing*, 395 So.2d 1226 (Fla. 3d DCA 1981).

The Third District explained the rule succinctly in dismissing a products liability claim which did no more than plead the legal conclusion that the product was defective and unreasonably dangerous for its intended use:

> Pleadings must contain ultimate facts supporting each element of the cause of action. *Woodcock v. Wilcox*, 98 Fla. 14, 122 So. 789 (1929). Mere conclusions are insufficient. *Maiden v. Carter*, 234 So. 2d 168 (Fla. 1st DCA 1970). The amended complaint fails to plead ultimate facts establishing the elements of strict liability, that is, that the product was defectively designed or unreasonably unsafe for its intended use when it left the manufacturer.
>
> "It is not itself a breach of duty to supply

> materials which are reasonably safe and customarily used, even though the material might conceivably be made more safe, nor must the manufacturer make his product 'more' safe when the danger to be avoided is obvious to all." See *Evans v. General Motors Corporation*, 359 F.2d 822 (7th Cir. 1966); *Campo v. Scofield*, 301 N.Y. 468, 95 N.E. 2d 802 (1950).
>
> *Royal v. Black and Decker Manufacturing Co.*, 205 So. 2d 307, 310 (Fla. 3d DCA), *cert. denied*, 211 So. 2d 214 (Fla. 1968) (footnote omitted). The claim that defects in the engine or aircraft were the proximate cause of appellant's multiple sclerosis appears only as a conclusion and not through well-plead allegations.

Clark, supra, at 1229.

Similarly, in *Price v. Morgan*, 436 So. 2d 1116 (Fla. 5th DCA 1983), the Court affirmed the dismissal of a complaint which plead the legal conclusion of wanton or willful conduct, but failed to allege facts which if proven would establish the element:

> We recognize our obligation to consider as true all well-pleaded allegations so the complaint in considering an order on a motion to dismiss. Nevertheless, a pleading is insufficient if it contains merely conclusions as opposed to ultimate facts supporting each element of the cause of action. *Clark v.*

> *Boeing Co.*, 395 So. 2d 1226 (Fla. 3d DCA 1981). Appellant failed to allege any ultimate facts demonstrating any wanton negligence or wilful conduct of appellee subsequent to the arrival of the firemen on the scene, nor did she allege any opportunity to warn upon arrival of the firemen or any facts, such as those found in *Hall v. Holton*, whereby the presence of the fireman upon the premises could have been anticipated prior to the fire. The trial court was thus correct in dismissing the fourth amended complaint.

Id. at 1121-1122.

This basic rule of pleading has been applied as it must, to dismiss libel complaints which fail to allege facts which must be proven to establish elements of the claim. As the court in *Frieder v. Prince*, 308 So.2d 132, 134 (Fla. 3d DCA 1975), stated in affirming the granting of a motion to dismiss a defamation suit:

> We think the complaint filed by Frieder in this case fails to set forth facts which are legally sufficient to establish actual malice.

Or as the Florida Supreme Court held forty years ago in affirming the dismissal of a complaint in a libel suit:

> The conclusions of the pleader to the effect that the article complained of was false and defamatory is not controlling.

Cooper v. Miami Herald Publishing Co., 31 So.2d 383, 384 (Fla. 1947). Or as Judge Letts trenchantly noted:

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> Since such actual knowledge or reckless disregard must be proved, it follows that one or both must also be *specifically alleged.* Examination of the complaint before us reveals no such allegations except for the lone statement that the publication was "malicious." This is clearly insufficient under the law of *Gertz* which mandates our adherence.

Bianco v. Palm Beach Newspapers, Inc., 381 So. 2d 371, 372-73 (Fla. 4th DCA 1980) (emphasis added). See also, *Rishel v. Eastern Airlines, Inc.*, 466 So. 2d 1136 (Fla. 3d DCA 1985).

The Amended Complaint contains no allegations which if proven would establish the statements published are false. The Amended Complaint likewise contains no factual allegations which if proven would establish that Defendant know the statement sued upon are false, or entertained serious doubts as to their truth when they published this. Thus, the Complaint should be dismissed.

C. The Claim For Punitive Damages Must Be Dismissed Because No Evidence Has Been Proffered Which Would Provide A Reasonable Basis For Its Recovery.

Under Florida law, a plaintiff must either make an evidentiary showing, or a proffer of evidence, which would provide a reasonable basis for recovery of punitive damages, in order to include such a claim in the complaint. Section 768.72. Florida Statutes. The law provides:

> In any civil action, no claim for punitive

> damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery for such damages. The claimant may move to amend his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages to permitted.

Where a plaintiff fails to make the requisite evidentiary showing or proffer, the claim must be struck or dismissed *Key West Convalescent Center, Inc. v. Doherty,* 619 So. 2d 367 (Fla. 3d DCA 1993). *Carroll v. Magnaflux Corp.*, 460 So. 2d 991 (Fla. 4th DCA 1984). As the *Carroll* court explained:

> In Count V appellant attempts to state a cause of action for punitive damages against all of the defendants named in his Fifth Amended Complaint. We find the allegations of Count V vague, ambiguous, and indefinite. First, the most liberal reading of Count V fails to disclose which allegations, if any, appellant intended to assert against appellees. Second appellant's allegations that "the Defendants" (referring to all defendants named in the Fifth Amended Complaint)

> wilfully, wantonly and with malice, moral turpitude or reckless indifference acted to cause the injury to appellant cannot, absent allegations of supporting ultimate facts, convert his negligence claim to a cause of action for punitive damages.
>
> > The use of the descriptive words "willful, wanton or reckless" is not sufficient to state a case entitling recovery of exemplary of punitive damages. . . . In order to recovery exemplary damages, the complaint must allege some general facts and circumstances of fraud, malice, gross negligence, or oppression. *Winn & Lovett Grocery Co. v. Lrcher*, 1936, 126 Fla. 308, 171 So.214. Adjective employed to label an act are of themselves insufficient to support a claim of gross negligence and are in fact unnecessary.
>
> *Rice v. Clement*, 184 So.2d 678, 680 (Fla. 4th DCA 1966). We hold the allegations of Count V insufficient to state a cause of action for punitive damages against appellees.

Since the Amended Complaint proffers no evidence establishing actual malice and express malice, both of which are required to obtain punitive damages in a Florida public figure libel suit, the punitive damages claim should be struck or dismissed.

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Conclusion

For the foregoing reasons the motion to dismiss should be granted.

Respectfully submitted,

BAKER & McKENZIE
Suite 1600, Barnett Tower
701 Brickell Avenue
Miami, Florida 33131
(305) 789-8900
Attorneys for Defendants

By: s/ Richard J. Ovelmen
Richard J. Ovelmen
Florida Bar No. 284904

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by hand this 12th day of October, 1994 upon:

Ira J. Kurzban, Esq.
Kurzban Kurzban & Weinger, P.A.
2650 S.W. 27th Avenue
2nd Floor
Miami, Florida 33133

s/ Richard J. Ovelmen

APPENDIX D — TRANSCRIPT OF PROCEEDINGS DATED OCTOBER 19, 1994

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA GENERAL JURISDICTION DIVISION

CASE NO. 92-22382

MAGNA MONTIEL DAVIS,

Plaintiff,

vs.

MARIETA FANDINO, HILDA INCLAN, and MARIETA FANDINO d/b/a "LA VERDAD",

Defendants.

TRANSCRIPT OF PROCEEDINGS

BEFORE

THE HONORABLE MURRAY GOLDMAN

Dade County Courthouse
73 West Flagler Street
Dade County, Florida

Wednesday, October 19, 1994
3:40 p.m.

[2] APPEARANCES

Appendix D

For the Plaintiff:

IRA J. KURZBAN, ESQ.
BRIAN TORRES, ESQ.
Of the Law Offices of
Kurzban, Kurzban &
Weinger, P.A.
2nd Floor
2650 S.W. 27th Avenue
Miami, Florida

For the Defendants:

RICHARD J. OVELMEN, ESQ.
JOHN PANTIN
Of the Law Offices of
Baker & McKenzie
Suite 1600, Barnett Tower
701 Brickell Avenue
Miami, Florida

- - - - -

[3] MR. KURZBAN: My name is Ira Kurzban. I'm the attorney for Magna Davis. I'm with the firm Kurzban, Kurzban & Weinger, and with me is Brian Torres, who has passed the bar but is not yet admitted, but worked on this.

MR. OVELMEN: My name is Richard Ovelmen I'm the attorney for the defendants. I'm with Baker and McKenzie.

THE COURT: Shall we proceed?

MR. OVELMEN: Yes, sir. We're here on the defendant's motion to dismiss. The basis for the motion is really three-fold.

First, we point out that under controlling United States

Supreme Court precedent, the speech here is protected. We do not claim some kind of blanket exemption for political speech. What we are saying is that speech that involves political judgements, that is, speech that is not subject to a verification of facts, but asserts opinion, asserts political statements, that kind of speech is protected, and is protected under a long line of cases which we cite in our memorandum.

THE COURT: Which I've never seen.

[4] MR. OVELMEN: You've never seen our memorandum?

THE COURT: No. Mr. Kurzban's was given to me about an hour and a half ago.

MR. OVELMEN: Ours was served quite some time —

MR. KURZBAN: Your Honor, it says October 14, admitted.

THE COURT: You filed it downstairs.

MR. KURZBAN: Yes.

THE COURT: You anticipated that the clerk would bring it up to me, but that's not a good anticipation.

MR. KURZBAN: Do you want —

THE COURT: I've got yours.

MR. KURZBAN: Do you want to reschedule?

THE COURT: No. I read yours, but I haven't read Mr. Ovelmen's.

MR. OVELMEN: Ours was a responsive memorandum that was served and filed October 12.

THE COURT: They're a good month behind downstairs. Do you have a copy for me?

MR. OVELMEN: Yes.

[5] MR. PANTIN: Yes, we do, Your Honor.

MR. OVELMEN: Well, okay. Let's start at the beginning, then, very quickly.

What the complaint alleges is that Magda Davis, who is the plaintiff, has been libeled in two respects: One, that she's been denominated a Castroisto, pro-Castro, or Castro supporter, and second, in a very similar, but a little longer formulation, that she represents or serves the interests of Castro in the United States. Those are the actionable — they are embedded in several — two statements of opinion columns or news articles. We consider them opinion pieces, written by one of the defendants, Hilda Inclan.

In any event, our major argument, our principle argument, is that under the Milkovich, Hustler, Letter Carrier, Greenbelt, Ocala Star Banner line of Supreme Court cases, whether someone is pro-Castro or a Castro sympathizer or can be said to represent the interests of Castro, that involves a political judgment, and a political judgment or political expression of [6] that kind, which is not the same as saying, asserting a proposition of fact, is protected under the first amendment.

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Let me draw that distinction very carefully for the Court. If, for example, you're running for office and you say of your opponent that he stole $50,000, that's political speech, but it's not protected because it asserts a verifiable fact. If you say that your opponent suffers from a loathsome disease or is unchaste, that is, your opponent is having affairs with specific women, those are statements of fact. They are subject to verification and they are suable on. But what the Supreme Court cases address are situations such as where you call your opponent a traitor, where you call your — and the Court has said it's just not actionable; that is an expression of opinion, a value judgment.

Where you say that your opponent is blackmailing somebody, or in the leading case, which is Milkovich versus Lorain Journal, the Court said very specifically — in fact, let me give Your Honor the case. [7] This is the most recent U.S. Supreme Court.

If the Court will look at page 2706, the highlighted portion, it says: "Foremost, we think Hepps" — now, by Hepps, they're referring to the earlier decision of Philadelphia Newspapers versus Hepps which says — well, it says, "We think Hepps stands for the proposition that a statement — a statement on matters of public concern must be provable as false before there can be liability under state defamation law at least in situations, like the present, where a media defendant is involved. Thus, unlike the statement, 'In my opinion Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable."

Now, what they're really saying here is that we published a statement that says oppose Magna Davis because she shows her

abysmal ignorance by following the teachings or supporting Fidel Castro. And what the Court is saying is whether or not somebody follows the teachings of Marx and Lenin, [8] that's a political judgment. Whether or not it's bad, whether it's even —

THE COURT: Let me interrupt you.

MR. OVELMEN: Yes.

THE COURT: We have to look at all of these things in their context.

MR. OVELMEN: That's correct.

THE COURT: Mr. Kurzban spent five pages in the complaint setting out the particular situation that exists.

MR. OVELMEN: Yes, sir.

THE COURT: Whereas if you lived in Muncy, Indiana or Des Moines, Iowa and you said to somebody, well, he's real bad because he likes Castro, that would get you a doughnut maybe. You know, passing in the street, nobody would pay any attention. But if you go on Southwest 8th Street and point to him and say he supports Castro, he might be dead in three minutes.

MR. OVELMEN: But the point —

THE COURT: That's the allegation.

MR. OVELMEN: That may all be truth. Believe me, if you — I'm from Indiana —

THE COURT: I picked the wrong place.

[9] MR. OVELMEN: If you said La Porte, Indiana, somebody is communist or Marxist, they wouldn't like you either, but that's not the point. The point is not whether it's injurious to your reputation. The point isn't whether people will hate you because of it. The point is whether that statement is an actionable statement.

In other words, the point, is that a statement like he stole $50,000, it's susceptible to verification. Or is it a political judgment that we protect?

And what the Supreme Court is saying is that when you attack a candidate because you say, you know, he's Marxist or he shows his ignorance by being a follower of Lenin or something, well, that's horrible things to say about him and in this community it would be very, you know, damaging to their reputation if taken, you know, at face value.

The fact is, it is not the kind of statement that we allow a libel suit on. And they cite no case from any court, other than a 1953 case decided 20 years before this [10] entire doctrine — their only case. They don't cite any U.S. Supreme Court case that allows a lawsuit on a political judgment case or where someone has said someone is a Marxist or fascist or anything. They have no cases. There are no cases. The only case they can cite as case decided in 1953.

Now, this doctrine developed post-1964. I have a U.S. Supreme Court case that says that if you call somebody a Marxist and say they're an idiot and you should not vote for them because they are a Marxist, that's not actionable, and the reason for that is

that whether someone is pro-Castro, whether they're pro-communist or whether they're a Marxist or not is the kind of statement that is not susceptible to empirical verification. It is the kind of expression that is protected. And we have other cases as well.

I mean, in addition to the blackmail case and the traitor case, we have the case of Hustler, where the argument was made there that, of course, it's highly defamatory to assert that your first sexual experience was [11] incest with your mother, but the Court said that's not actionable in the context of a cartoon lampooning, you know, Jerry Falwell.

The issue here is not whether people in South Florida take umbrage at that. The issue is whether it's the kind of statement that you can verify in the same way you can verify someone stealing $20,000 or how many seats are there in the Orange Bowl or something like that. Whether she is too pro-Castro for our taste is a question of taste. Whether because of her marriage to Mr. Kurzban and his activities and her statement that she opposes everything Ileana Ros-Lehtinen stands for makes her someone who is too much in favor of Castro for the voters in Dade County, that is an issue for them to decide.

THE COURT: Does the issue of malice enter into this at all?

MR. OVELMEN: Yes. That's our next argument.

So the first argument is simply whether the expression at all is the kind of expression that is protected, and our point [12] is that it is, and we have a case in the U.S. Supreme Court, fortunately, that provides the essence of what their claiming here, is that statement. And we have others that are are better. Traitor, blackmailer, etcetera.

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Now, our second argument is that, look, this person is a public figure. The law is black letter that a candidate for public office is a public figure. They don't dispute that. Everyone acknowledges it. If you're a public figure, that means you have to prove a number of things. Among the things you have to prove are actual malice as the constitutional doctrine developed and falsity, and a lot of people don't realize that you have to prove both things. The Hepps case that we made earlier reference to, decided the issue once and for all, and it's been reacknowledged, reaaffirmed in Milkovich, that a public figure plaintiff must prove the statements are false. Actual malice requires that you prove that when I published a statement, I knew it to be false, or that I had reckless disregard. But reckless disregard is not an objective — I [13] mean is not a reasonable man standard. Objective — excuse me, Your Honor. Wreckless disregard means that there was a high subjective awareness of falsity; in other words, it is a scienter test that requires the Court to say that you prove there were serious doubts at the time of publication.

THE COURT: But hasn't he alleged that?

MR. OVELMEN: I'll get to that. That's my argument.

My argument is that under Florida law you must prove — I mean you must plead —Florida pleading law, and we cite many cases — you must plead facts which, if proven, would make out each of the elements of the claim. One element is falsity. So you have to plead facts which are proven which show the statements are false.

Another element is actual malice, which is that they knew when they published this it was false or they had — they, in fact, entertained serious doubt when they published it, okay.

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Our point is very simple. They have not [14] pled any facts which have proven true which show the statements are false, nor have they pled any facts which, if proven true, would show there was serious doubts or actual knowledge of falsity.

For example, what would that look like? Well, suppose six years ago she told — Magda Davis told Hilda Inclan, "I really am very much against Fidel Castro and I've done the following 16 things." Let's say Hilda Inclan told somebody, "Gee, we don't believe the story at all. You know, blah, blah, blah. And we're just doing it for other reasons." There are no allegations of any kind as to actual malice in the complaint other than the conclusion, pleading the legal conclusion, they published with actual malice. That's it.

As to falsity, there are no allegations as to falsity in the entire complaint — it's got all this stuff — except the allegation the statements published are false.

Now, why is that? Well, if you remember back to our first argument, our first argument was well, whether you're pro-Castro [15] or not or you support Castro or not, that's really an opinion. That's a judgment. It's a political thing. Of course, if that's the case, there aren't going to be any facts that you can plead that show it to be false or true, for that matter, and, of course, as far as actual malice goes, what are the facts going to be, that people didn't believe it?

I mean, let's face it. After Magda Davis kissed Castro and said he's a great teacher, and that's all disseminated in the press, my clients believe it more today than they ever — I mean, how could you ever prove actual malice in a case like this?

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Well, we are not saying today they have to prove it. All we are saying is, under Florida law we are a state that requires that ultimate facts be pled for each element, for each element, and all we're asking is, well, what are the facts that, if you prove them, show that our people entertained serious doubts. And what are the facts? If you plead them and you prove them, what are the facts that show that these statements are false. That's all. Just tell us what they [16] are. You know, we have a right to be on notice as to what that stuff is.

Now, they say, well, you know, there's a case like Herbert v. Lando which says you can conduct discovery. And they say, gee, they must not know about that. Well, I wrote the principal brief in Herbert v. Lando. I know Herbert v. Lando very well. What Herbert v. Lando said is that there's no absolute privilege for the editorial process. It doesn't say that if a state requires fact pleading as to each element, you're excused from that. It simply says that you can't raise as an absolute privilege, you know, editorial activities. I mean, Herbert v. Lando is apropos of nothing here. Believe me, I'm in a position to know what it's apropos of.

Another thing they raise, and this is really our third argument, is that there is no cause of action for libel per se in Florida. There are — and I'll hand the Court a case or two on that, because it's really a verbalism that they're playing on.

The leading case is Mid-Florida [17] Television versus Boyles, another case in which I wrote the briefs for some major players.

If the Court were to look at the highlighted portion, first under Roman Numeral 1, the opinion says: The issue for review is

whether Gertz has abrogated a cause of action for libel per se brought by a private person against a media defendant. Undoubtedly the distinction between libel per se and libel per quod, once clear, has blurred. At common law, before Gertz, we said 'words amounting to a libel per se necessarily import damage and malice in legal contemplation, so these elements need not be pleaded or proved, as they are conclusively presumed as a matter of law.'"

I would add there was a third presumption. They were called the three galloping presumptions of libel per se. The third presumption was falsity. So what you used to be able to do is presume damage, malice and falsity under the common law for libel per se. That was the cause of action for libel per se. All you had to do was [18] plead that the statement was made and published and it was of and concerning the defendant, and then you got the benefit of these three presumptions, two of which are mentioned in this opinion. The third one wasn't relevant. And I'll explain why in a minute, too. In any event, those were the three galloping presumptions.

The Court then goes to to say: "This statement is no longer accurate regarding a libel action against the media. Nonetheless, for purposes of pleading in a negligence action against the media, labeling an action libel per se remains a useful shorthand for giving a media defendant notice that the plaintiff is relying upon the words sued upon as facially defamatory and, therefore, actionable without resort to innuendo."

What does that mean? That's very simple. There are two kids — in any libel suit one of the elements is defamation. If the Court wants to look at Justice Erhlich's concurrence, he explains what's going on.

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What he says is, "The distinction between libel per se and per quod has not [19] 'blurred.' Libel per se is dead, and let no one read from this decision that this ghost which we find still persists lingers in any form other than as a shorthand term. To avoid confusion, in my opinion, any attorney would be well-advised when drafting a libel complaint to avoid the use," blah, blah, blah.

Our only point is this: Subsequent to this case, Hepps came down and Hepps said you have to prove falsity as well. It eliminated the third of the galloping presumptions.

What's left, then, of defamation per se or libel per se? Well, the cause of action, libel per se, where you got to presume malice, you got to presume falsity and you got to presume damage, that's gone. That's gone against the media. There is no such cause of action. However, the element of libel in which you say is a statement defamatory, is it injurious to someone's reputation, there is still that element as to whether or not the defamation goes on its face or requires an extrinsic fact, and I'll explain that.

[20] THE COURT: You better do it quick.

MR. OVELMEN: For example, if I say that my colleague, Mr. Pantin, has a loathsome disease, that's defamation per se. All it means is that that statement is defamatory on its face. I still have to, as my cause of action, I still have to prove, then, in a case against the media, I still have to prove falsity, I still have to prove the damage and I still have to prove the malice. But another statement might be, I saw Mr. Pantin with a young woman, and it turns out you happen to know the young woman is married, and that's extrinsic. You know, that's not on the face. That's per quod. All right.

Well, that distinction remains in the law. There's a difference between statements that are defamatory per se and defamatory per quod. But the cause of action, libel per se, that's dead. I mean against the media. You can't have a presumption of the other elements anymore, and that's the law.

Now, what we are saying is — that's all we are saying. We're saying that they haven't proved — I mean they haven't pled. [21] They haven't pled any facts which show malice or falsity. They simply have alleged legal conclusions, and I've cited many cases in my memorandum that say that's not good enough.

And they cite on the other side, for example, Perry versus Cosgrove as one of their important cases on the other side, but if the Court will take a look at that authority, if the Court would note the footnote that has apparently been overlooked, it explains that this is not a case involving a "media defendant" because the material sued upon was never published by the media, although it appears on its face or at first blush, unless you read the footnote, to be a case against the media. It's not a case against the media because it was not a publication.

Now, that's their leading authority in opposition to us. Our cases, of course, are the standard Florida cases that require pleading of facts to establish elements. And there's a practical reason for that, Your Honor, because if they don't have any facts which show actual malice and they don't have [22] any facts which show — which if they plead them and can prove them, if they don't have any facts that show falsity, we are going to be putting the parties to an incredible amount of expense for no reason.

One of the cases we rely on heavily is a Third District Court

of Appeal case on a libel suit on a dismissal in which the Court said that, you know, they didn't plead facts which, if proven, would show the malice and, therefore, the case — you know, the complaint was properly dismissed. If I can hand it to the Court. Frieder v. Prince, which is precisely the holding of that case.

They have no cases that say that, gee, all you have to do is plead legal conclusions. And that's our point on that, and we think that under the circumstances here, we are entitled to, you know, our dismissal.

One last point, Your Honor. We believe for the same reasons, the punitive damage claim should be struck.

THE COURT: Well, you don't have to go into 768.

[23] MR. OVELMEN: Okay.

MR. KURZBAN: May I respond, Your Honor? Thank you.

First of all, I admire Mr. Ovelmen's persistence. Your Honor should be aware of the fact that Mr. Ovelmen has made the exact same arguments here twice now before another judge in the Maldonado case and in the Lagos case, and the judge has denied their motion to dismiss. Virtually the same brief and the same arguments.

And the reasons why Judge Bloom denied their motion to dismiss are the same reasons why you should deny their motion to dismiss today.

First of all, it is not true that these are statements of opinion.

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The Milkovich case that he sites, he miscites, because in Milkovich they specifically say, "In my opinion, X, that the person is a person who is supportive of the teachings of" — in fact, let me read it: "In my opinion, Your Honor, Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin."

[24] Here these were not stated as opinion. The two statements, in fact, very clearly were made in the context, as we pointed out in our brief, were made in the context of them saying that these are statements which we will give you more information on.

The article says: "As we receive these documents and we verify them, we will publish them for the information of the voters."

The statements themselves do not say this is in my opinion, and although counsel now tries to suggest it was in some kind of opinion column, the way the statements were made, they clearly indicated that they were statements of fact.

Both statements state — the first one states that Magda Davis is a supporter of Fidel Castro. The second statement was Montiel Davis represents the interests of Fidel Castro in the United States. Those are statements of fact. They can be verified as to whether or not — the implication obviously is that she's an agent for Fidel Castro in the United States and represent his interests.

[25] There is no case that they cite, by the way, which suggests that when there are statements about a person being a communist and suggesting that they're a communist or communist supporter that there is no cause of action, and though

my colleague seeks to make light of a Supreme Court decision, there is a Florida Supreme Court decision directly on point that says and has held that to accuse someone of being a communist is defamation per se in this state. That decision has never been reversed since 1953 and is the governing law in this state.

So I don't think there is any issue that if you call somebody a communist, it's defamation per se, let alone given the facts that we have alleged here, and I don't have to tell Your Honor — you live in this community and I think what you said before is just common knowledge. One can almost take judicial notice of the fact that saying something like that amounts to defamation in this community.

With respect to the other arguments, I think we have adequately briefed the other [26] arguments. The truth is and the facts are here that we have alleged actual malice. We have alleged that it was a false statement, that with respect to the issue of actual malice, we sent them a letter and asked them to cease and desist and then they published the second statement.

So I think right on the face of the complaint, the fact that we sent them a letter giving them notice under Florida law and telling them to retract it, and then they made the second statement, certainly indicates that there was actual malice here.

They have misstated the law with respect to whether or not we can make inquiries if we have alleged it on its face. The state, as you know, is a pleading state. We do not have to allege the kinds of things they're suggesting. We have alleged that it's a false statement. We have alleged that there was actual malice. We're allowed to conduct discovery based on that. We have alleged facts indicating that it was actual malice because we have

said that after sending them a letter and putting them on notice that this [27] was not true and was a false statement, they issued the second statement saying that Magda Davis represents the interests of Fidel Castro here. So I think with respect to those claims, there's no basis for it.

My colleague also misreads the question of libel per se. There is no case, including that Supreme Court case that they cite, the Florida Supreme Court says — that says that the doctrine of libel per se is abolished. They have only said that you need to allege facts that you didn't need to allege before, that is, you need to now allege actual malice, you need to allege that the statements were false, and we have done that. So, therefore, we have stated a claim for libel per se.

The other argument which apparently, even though they raised in their initial motion to dismiss, they didn't pursue here, but briefly on the question of punitive damages, this is a tort. We have alleged actual malice in the complaint. We have alleged facts supporting actual malice with respect to the —

[28] THE COURT: I'm going to follow 768.

MR. KURZBAN: Okay. Well, I think there obviously is — under 768 here we have alleged what we need to allege—

THE COURT: It's not a matter of allegation. Under 768, it says you have to have an evidentiary hearing at a later point, not necessarily hearing, but at least you have to give depositions, show me something that would reach the level that I would say, okay, you can go to a jury. It doesn't prevent you from taking any discovery you want. Obviously you have to take the discovery to prove your regular case, but it just keeps away the finances. They

don't have to provide their financial records until such time as I would say after a hearing, well, there's enough in these depositions that that wouldn't — that's how I've been doing it in all the cases. That's what I think the guidance there is.

MR. KURZBAN: I think the only difference here is, Your Honor may want to take a look at Florida Statute 770.02, and that's the statute we cited because that's [29] the statute that I think suggests that there is a difference in a libel case as opposed to a regular tort.

THE COURT: If I deny the motion, I'm still going to go under 768, but I haven't had a chance to read Mr. Ovelmen's memo yet.

MR. KURZBAN: Your Honor should keep in mind, as I said initially, that these very simple arguments — you may want to take a look at the briefs in the other cases. The same identical arguments were raised in the two other cases before Judge Bloom and they have been rejected.

THE COURT: Do you want to send this one to Judge Bloom?

MR. KURZBAN: Fine with me. I think they should all be consolidated actually. I don't see the purpose in trying them three times. I mean, if it's the same issue.

MR. OVELMEN: If I may just very briefly respond.

THE COURT: Sure.

MR. OVELMEN: First of all, in Milkovich, I guess it's

possible after all these years I could misstate the law on [30] libel, but I think if somebody says that, they better be careful.

In Milkovich, if the Court would look at page 2705, it addresses the point on whether or not it makes any difference to have the words "In my opinion" or "It's my opinion" or "Our opinion is." And the Court says that that adds nothing to the analysis. Whether you say "in my opinion" or you don't say "in my opinion" doesn't mean anything.

At the bottom of 2705, second column, starts at the last two lines. "If a speaker says, 'In my opinion Mayor Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statute may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to a reputation as the statement, 'Jones is a [31] liar.'

"As Judge Friendly aptly stated, it would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct by simply using explicitly or implicitly the words 'I think.' "

Now, if you turn over to the very next column on that same page, where I read from, what the Court compared was, "Thus, unlike the statement" — this is in the highlighted paragraph — "thus, unlike the statement, 'In my opinion Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable.'

Obviously, the analysis had nothing to do with whether the words "in my opinion," you know, were used.

The only other comment I would make is on the issue of retraction. There is no case that I'm aware of that holds that refusal to retract is evidence of actual malice. The reason is that actual malice is what you knew [32] at the time you published.

So in the first instance, a retraction demand is after the publication, where in this instance there's a publication both before and after. What the courts have said is that the refusal to retract is evidence that there was no actual malice because it is evidence that the defendant believed his statement to be true, and that's what the law is here, not what — not quite the reverse.

THE COURT: I have one other problem and then I'm going to chase you out of here.

The newspaper articles where the statements are are in Spanish.

MR. KURZBAN: No. They were translated, Your Honor.

THE COURT: Where?

MR. KURZBAN: And they were submitted to the Court.

MR. OVELMEN: We have copies. As a courtesy to the Court we will be happy to give — they are your translations.

MR. KURZBAN: Yes.

THE COURT: I don't have the translations.

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[33] MR. OVELMEN: Why don't you give the Court —

THE COURT: If I have them, I haven't found them.

MR. OVELMEN: That's all right.

THE COURT: I just have these.

MR. OVELMEN: Please give the Court —

THE COURT: Okay. That will be a help. Thank you very much.

MR. OVELMEN: Thank you, Your Honor.

MR. KURZBAN: Thank you.

(Thereupon, the hearing was concluded)

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CERTIFICATE OF NOTARY

STATE OF FLORIDA:

SS.

COUNTY OF DADE:

I, THOMAS J. KRESSE, a Shorthand Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that I reported in shorthand the proceedings in the above-styled cause before the Honorable MURRAY GOLDMAN, at the time and place as et forth; that that the foregoing pages, numbered rom 1 to 34, inclusive, constitute a true record.

I further certify that I am not an ttorney or counsel of any of the parties, nor related to any of the parties, nor financially terested in the action.

WITNESS my Hand and Official Seal this 31st day of October, 1994.

Notary Public State of
Florida. My Commission
expires Oct. 12, 1995.

s/ Thomas J. Kresse